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A TREATISE

ON THE

LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN, AND OTHER LEGAL SYSTEMS.

BY

HIS HONOUR THE LATE JUDGE PITT TAYLOR.

TENTH EDITION.

BY

W. E. HUME-WILLIAMS, B.A., LL.B.,

ONE OF HIS MAJESTY'S COUNSEL; RECORDER OF NORWICH;
A BENCHER OF THE MIDDLE TEMPLE;
Joint Author of "The Taking of Evidence on Commission."

Longum iter est per præcepta,
Breve et efficax per exempla.—SENECA.

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PREFACE TO THE TENTH EDITION.

THE last Edition of this work was published in 1895. Since that date the Laws of Evidence have been considerably altered both by Statute and by Authority. The object of the Editor has been to bring the work thoroughly up-to-date, and to that end no effort has been spared. Considerable modification of many legal axioms contained in the work have been necessitated by modern decisions, but as far as possible the original Text, abounding as it does in quaint phraseology and quainter illustration, has been left untouched and, it is hoped, unspoiled.

In order that the work may be of greater use to the practitioner the reference to Cases cited has been added to the citation, and not confined, as in the last Edition, to the Table of Cases. One reference only has been given in the Text but all are added in the Table.

The Editor desires to express his great indebtedness to Mr. Walter S. Shaw, of the Middle Temple, without whose able and unremitting help his task would not have been accomplished; to Mr. H. C. Biron, of Lincoln's Inn, who has supervised and in part re-drafted

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so much of this Edition as deals with the Law of Evidence in Criminal Cases; and to Mr. R. Riches, the able Librarian of the Bar Library, who has kindly carried out much laborious work in connection with the insertion of full references to Cases cited.

W. E. H.-W.

THE TEMPLE,
February, 1906.

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Abbreviations

BY WHICH VARIOUS IRISH, SCOTCH, AND AMERICAN AUTHORITIES ARE CITED IN THIS TREATISE.[1]

NOTE.—*Most of the American Reports are to be found in the respective Libraries of the Inner and Middle Temples. But some few of them are only to be obtained at the British Museum. The letters* A., B., C., D., *appended to the American Reports, denote the relative estimation in which those Reports are held by the profession in general, out of the particular State where the decisions were pronounced:* A. *marking the highest degree of excellence. A very eminent American jurist kindly furnished the Author with this guide.*

ABBREVIATIONS.	NAME OF WORK, ETC.
Addis.	Addison's Reports, Pennsylvania, 1791—1799. 1 vol. (C.)
Aik.	Aiken's Reports, Vermont, 1826—1827. 2 vols. (B.)
A. K. Marsh.	A. K. Marshall's Rep., Kentucky, 1817—1821. 3 vols. (D.)
Alc. & Nap.	Alcock & Napier's Reports, King's Bench, Ireland. 1 vol.
Alison, Cr. L.	Alison's Principles of the Criminal Law of Scotland.
Alison, Pract. of Cr. L.	Alison's Practice of the Criminal Law of Scotland.
Am. Dec.	American Decisions (Select Cases from various American State Courts), San Francisco, 1700—1844. 40 vols.
Am. Ed.	American edition.
Am. Jur.	American Jurist. Boston.
Am. Rep.	American Reports (Selected from the Decisions of the Courts of last resort in the several States of America), Albany, 1869—1887. 60 vols.
Am. St. Rep.	American State Reports (a continuation of American Reports), 1887—1895. 42 vols. (Series still current.)
Anthon	Anthon's Nisi Pr. Rep., New York, 1808—1818. 1 vol. (D.)
Applet.	Appleton's Reports, Maine, from 1841. 1 vol. (C.)
Arm. M. & O.	Armstrong, Macartney & Ogle's Rep., Nisi Pr., Irel. 1 vol.
Arm. & T.	Armstrong & Trevor's Rep. of R. *v.* O'Connell, Dub., 1844.
Bail.	Bailey's Reports, South Carolina, 1828—1832. 2 vols. (B.)
Ball & B.	Ball & Beatty's Reports, Chancery, Ireland. 2 vols.
Batty	Batty's Reports, King's Bench, Ireland. 1 vol.
Bay	Bay's Reports, South Carolina, 1783—1804. 2 vols. (B.C.)
Bell, Dig.	Bell's Digest of the Laws of Scotland.
Bibb	Bibb's Reports, Kentucky, 1808—1817. 4 vols. (D.)
Binn.	Binney's Reports, Pennsylvania, 1799—1814. 6 vols. (A.)
Bland, Ch.	Bland's Chancery Rep., Maryland, 1811—1830. 2 vols. (C.)
Blackf.	Blackford's Reports, Indiana, 1817—1838. 4 vols. (C.D.)
Browne	Browne's Reports, Pennsylvania, 1806—1814. 2 vols. (C.)
Burnet, Cr. L.	Burnet on Criminal Law of Scotland.

[1] A list of the ordinary abbreviations used in English law is commonly known, and can, at any rate, be found in the catalogues of many law publishers.

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ABBREVIATIONS.	NAME OF WORK, ETC.
Caines	Caines's Reports, New York, 1803—1805. 3 vols. (A.)
City Hall Rec. ...	New York Recorder, containing Reports of Cases in City Courts from 1816 to 1821. 6 vols.
Com.	Commonwealth.
Conklin's Pr.	Conklin's Practice of Cts. of United States, New York, 1842.
Conn.	Connecticut Reports, by T. Day, 1814—1848. 15 vols. (B.)
Const. R.	Constitutional Rep., S. Carolina, 1812—1816. 2 vols. (B.C.)
Const. U.S. Amend.	Amended Constitution of the United States.
Cooke & Alc.	Cooke and Alcock's Rep., King's Bench, Ireland. 1 vol.
Cooke	Cooke's Reports, Tennessee, 1811—1814. 1 vol. (D.)
Cowen	Cowen's Reports, New York, 1823—1828. 9 vols. (A.)
Coxe	Coxe's Reports, New Jersey, 1790—1795. 1 vol. (C.)
Cranch	Cranch's Rep., Sup. Ct. of U.S., 1800—1815. 9 vols. (A.)
Crawf. & D., Abr. C.	Crawford and Dix's Abridged Cases in Ireland. 1 vol.
Crawf. & D., C. C.	Crawford and Dix, Irish Circuit Reports. 3 vols.
Cush.	Cushing's Rep. Supreme Court of Massachusetts. 9 vols.
Dall.	Dallas's Reports. Supreme Courts of United States, and Pennsylvania, 1790—1806. 4 vols. (A.)
Dane, Abr.	Dane's Abridgment, United States.
Day	Day's Reports, Connecticut, 1802—1810. 5 vols. (B.)
Deane, Verm. R....	Deane's Reports, Supreme Court of Vermont. 3 vols.
Dev.	Devereux's Rep., North Carolina, 1826—1834. 4 vols. (B.)
Dev. & B.	Devereux and Battle's Rep., North Carolina, 1834—1840. 4 vols. (B.)
Dickson, Ev.	Dickson on Evidence in Scotland. 2 vols. Edinburgh, 1855.
Drury, Ch. R.	Drury's Irish Chancery Rep., temp. Sugden, Ch. 1 vol.
Dru. & War.	Drury and Warren's Reports, Chancery, Ireland. 4 vols.
Ersk. Inst.	Erskine's Institutes of the Law of Scotland.
Fairf.	Fairfield's Reports, Maine, 1833—1835. 3 vols. (B.)
Fox & Sm.	Fox and Smith's Reports, King's Bench, Ireland. 2 vols.
Gall.	Gallison's Reports, United States, 1st Circuit Court, 1812—1815. 2 vols. (A.). Judge Story's Decisions.
Gill & J.	Gill and Johnson's Rep., Maryland, 1829—1840. 10 vols. (B.)
Glassf. Ev.	Glassford on Evidence, Edinburgh, 1820.
Gr. Ev.	Greenleaf on Evidence.
Gray	Gray's Reports, Supreme Court of Massachusetts. 2 vols.
Greenl.	Greenleaf's Reports, Maine, 1820—1832. 9 vols. (B.)
Halst.	Halstead's Reports, New Jersey, 1821—1831. 7 vols. (C.)
Har. & G.	Harris and Gill's Rep., Maryland, 1826—1829. 2 vol. (B.)
Har. & M'Hen. ...	Harris and M'Henry's Rep., Maryland, 1790—1799. 4 vols. (D.)
Hardin	Hardin's Reports, Kentucky, 1805—1808. 1 vol. (D.)
Harr. & J.	Harris and Johnson's Reports, Maryland, 1800—1826. 7 vols. (B.)
Hawks	Hawks' Reports, North Carolina, 1820—1826. 4 vols. (C.)
Hayes	Hayes' Reports, Exchequer, Ireland. 1 vol.
Hayes & Jon.	Hayes and Jones' Reports, Exchequer, Ireland. 1 vol.
Hayw.	Haywood's Reports, North Carolina, 1789—1806. (C.)
Hen. & Munf.	Henning and Munford's Rep., Virginia, 1806—1809. 4 vols (C.)
Heisk.	Heiskell, Tennessee, 1870—1874. 12 vols.
Hill, S. Car. R. ...	Hill's Reports, South Carolina, 1833—1835. 2 vols. (B.C.)
Hill, N. Y. R.	Hill's Reports, New York, 1841—1842. 3 vols. (B.)
Howard, S. Ct. R.	Howard's Rep., United States, Sup. Ct., from 1843. (A.)
Hume, Com.	Hume's Commentaries on Criminal Law of Scotland.
Humph.	Humphrey's Reports, Tennessee, 1839—1841. 2 vols. (D.)

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ABBREVIATIONS.	NAME OF WORK, ETC.
Iredell	Iredell's Reports, North Carolina, 1840—1841. 1 vol. (C.)
Ir. C. L. R.	Irish Common Law Reports, 1849—1866. 17 vols. Formerly cited by Author as "Ir. Law R. N. S."
Ir. Ch.	Irish Chancery Reports, 1850—1866. 17 vols. Formerly cited by Author as "Ir. Eq. R. N. S."
Ir. Cir. R.	Irish Circuit Reports. 1 vol.
Ir. Eq. Rep.....	Irish Equity Reports, 1838—1850. 13 vols.
Ir. L. T. Rep.	Irish Law Times Reports.
Ir. L. R.	Irish Law Reports (*i.e.*, Reports at Common Law), 1838—1850. 13 vols.
I. R. C. L.	Irish Reports, Common Law, 1867—1877.
I. R. Eq.	Irish Reports, Equity, 1867—1877.
J. J. Marsh.	J. J. Marshall's Rep., Kentucky, 1829—1832. 7 vols. (D.)
Jebb, C. C.....	Jebb's Crown Cases Reserved, Ireland. 1 vol.
Jebb & B.	Jebb and Bourke's Rep., Queen's Bench, Ireland. 1 vol.
Jebb & Sy.	Jebb and Symes' Rep., Queen's Bench, Ireland. 2 vols.
Johns.	Johnson's Reports, New York, 1806—1823. 20 vols. (A.)
Johns. Ch. R.....	Johnson's Chan. Rep., New York, 1814—1823. 7 vols. (A.)
Jones	Jones' Exchequer Reports, Ireland. 2 vols.
Jones & Lat.	Jones and Latouche's Rep., Chancery, Ireland. 3 vols.
Joy on Conf.	Joy on Confession in Criminal Cases, Dublin, 1842.
Kent, Com.....	Kent's Commentaries, Boston, 1840.
Kirby	Kirby's Reports, Connecticut, 1785—1788. 1 vol. (D.)
L. R. (Ir.)	Law Reports for Ireland, 1878—1894. 33 vols. (vol. 33 current to end of 1894). Formerly cited by Author as "Ir. Law R."
LL., U. S.	Laws of the United States.
Lans. (N. Y.)	Lansing, Reports of Decisions in the Supreme Court of the State of New York. New York and Albany, 1869—1873. 7 vols.
Law Rec. 1st Ser. *or* 2nd Ser.	Law Recorder, 1st and 2nd Series. Irish. 10 vols.
Leigh, R.....	Leigh's Reports, Virginia, 1829—1839. 9 vols. (B.)
Lloyd & G.	Lloyd and Goold's Ir. Chan. Rep., temp. Sugden, Ch. 1 vol.
Long. & T.	Longfield and Townsend's Rep., Exchequer, Ireland. 1 vol.
Louis.	Reports of Louisiana, 1830—1840. 16 vols. (B.)
McC.....	McCord's Rep., South Carolina, 1820—1828. 4 vols. (B.C.)
McC., Ch. R.	McCord's Chancery Reports, South Carolina, 1825—1827. 2 vols. (B.C.)
McDouall, Inst. ...	McDouall's (Ld. Bankton) Institutes of Law of Scotland.
McNally, Ev.	McNally on Evidence, Ireland.
A. K. Marsh.	A. K. Marshall's Rep., Kentucky, 1817—1821. 3 vols. (D.)
J. J. Marsh.....	J. J. Marshall's Rep., Kentucky, 1829—1832. 7 vols. (D.)
Mart.	Martin's Reports, Louisiana, 1809—1823. 12 vols. (B.)
Mart., N. S.	Martin's Reports, New Series, Louisiana, 1823—1830. 8 vols. (B.)
Mart., N. Car. R.	Martin's North Carolina Reports, 1778—1797. 1 vol. (D).
Mart. & Y.....	Martin and Yerger's Rep., Tennessee, 1825—1828. 1 vol. (D.)
Mason	Mason's Reports, United States, 1st Circuit Court, 1816—1830. 5 vols. (A.) Judge Story's Decisions.
Mass.	Reports of Massachusetts, 1804—1822. (A.)
Metc.	Metcalf's Reports, Massachusetts, 1840—1846. (A.)
Milw. Ec. Ir. R....	Milward's Eccles. Irish Rep., temp. Dr. Radcliffe.
Mo.	Missouri, 1821—1881. 74 vols.
Moll.	Molloy's Reports, Chancery, Ireland. 3 vols.

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ABBREVIATIONS.	NAME OF WORK, ETC.
Monroe	Monroe's Report, Kentucky, 1824—1828. 7 vols. (D.)
Morison	Morison's Scotch Reports.
Munf.	Munford's Reports, Virginia, 1810—1820. 6 vols. (C.)
Murph.	Murphey's Reports, North Carolina, 1804—1819. (C.)
N. York Civ. Code	The Code of Civil Procedure of New York, 1850.
N. York Cr. Code	The Code of Criminal Procedure of New York, 1850.
New Hamp.	Reports of New Hampshire, 1816—1843. (B.)
Nott & M'C.	Nott and M'Cord's Rep., S. Carolina. 1817—1820. 2 vols. (B.)
Ohio R.	Hammond's Ohio Reports, Ohio, 1821—1839. 9 vols. (D.)
Pa. St....	Pennsylvania State Reports, New York and Albany, 1845—1895. 165 vols. (Series still current.)
Paige	Paige's Chan. Rep., New York, 1828—1844. 10 vols. (B.)
Paine	Paine's Rep., United States, 2nd Circuit Court, 1810—1826. 1 vol. (B.)
Paine & D. Pr. ...	Paine and Duer's Practice of the Courts of the United States, New York, 1830.
Peck	Peck's Reports, Tennessee, 1822—1824. 1 vol. (D.)
Penning.	Pennington's Rep., New Jersey, 1806—1813. 2 vols. (C.)
Pennsylv.	Reports of Pennsylvania. 1829—1832. 3 vols (B.)
Pet.	Peters' Rep., Supreme Courts of United States, 1827—1843. (A.)
Pet. C. C. R.	Peters' Circuit Courts Reports, United States, 3rd Circuit Court, 1803—1818. 1 vol. (B.)
Pick.	Pickering's Rep., Massachusetts, 1823—1840. 24 vols. (A.)
Porter	Porter's Reports, Alabama, 1834—1839. 9 vols. (D.)
Poth. Obl.	Pothier on Obligations, by Evans, Philadelphia ed., 1826.
Rand.	Randolph's Reports, Virginia, 1821—1828. 6 vols. (B.)
Rawle.	Rawle's Reports, Pennsylvania, 1828—1835. 5 vols. (A.)
Rev. St.	Revised Statutes of different States in America.
Ridg. L. & S.	Ridgway, Lapp and Schoales' Rep., King's Bench, Irel. 1 vol.
Ridg. P. C.	Ridgway's Parliamentary Cases, Irish Parliament.
Riley	Riley's Law Cases, South Carolina, 1836—1837. 1 vol. (B.)
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery, Ireland. 2 vols.
Serg. & R.	Sergeant and Rawle's Rep., Pennsylv., 1818—29. 17 vols. (A.)
Shepl.	Shepley's Reports, Maine, 1836—1841. 6 vols. (C.)
South.	Southard's Reports, New Jersey, 1816—1820. 2 vols. (C.)
Stair Inst.	Stair's Institutes of the Law of Scotland.
Story, R.	Story's Reports, United States, 1st. Circuit, 1839—1845. 3 vols. (A.) Judge Story's Decisions.
Summ.	Summer's Reports, 1st Circuit Court of United States. Judge Story's Decisions. 1830—1839. 3 vols. (A.)
Swift Dig.	Swift's American Digest.
Swift Ev.	Swift's American Law of Evidence. Hartford.
Tait Ev.	Tait on Evidence. Edinburgh, 1834.
U. S.	United States.
Verm.	Vermont's Reports, Vermont, 1826—1837. 9 vols. (B.)
Virg. Cas.	Virginia Cases, Virginia, 1789—1826. 2 vols. (D.)

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ABBREVIATIONS.	NAME OF WORK, ETC.
Wall.	Wallis's Irish Chancery Reports, 1766—1791, 1 vol.; or in references to American Reports, either Wallace's United States Supreme Court Reports, Washington, 1863—1874, 23 vols.; or else Wallace's Circuit Court Reports, Philadelphia, 1801. 1 vol.
Wall, Jr.	Philadelphia. 1842—1862. 3 vols.
Wash.	Washington's Reports, Virginia, 1790—1796. 2 vols. (C.)
Wash. C. C. R. ...	Washington's Circuit Court Reports, United States, 3rd Circuit Court, 1803—1827. 4 vols. (B.)
Watts	Watts' Reports, Pennsylvania, 1832—1840. 10 vols. (A.)
Watts & S.	Watts and Sergeant's Rep., Pennsylv., 1841—1842. 3 vols. (A.)
Wend.	Wendall's Reports, New York, 1828—1841. (A.)
Whart.	Wharton's Reports, Pennsylvania, 1835—1840. 6 vols. (A.)
Wheat.....	Wheaton's Rep., Superior Ct. of Un. States, 1816—1827. (A.)
Wheel C. C.	Wheeler's Criminal Cases, New York. 3 vols. (D.)
Woodb. & M.	Woodbury and Minot's Reports, United States, 1st Circuit, 1845—1847. 2 vols. (A.)
Wright, R.	Wright's Reports, Ohio, 1831—1834. 1 vol. (D.)
Yeates...	Yeates' Reports, Pennsylvania, 1791—1808. 4 vols. (B.)
Yerg.	Yerger's Reports, Tennessee, 1832—1837. 10 vols. (D.)

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ADDENDA.

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182, *in notes. At end of note* [7], *add*—"See, however, the recent case of Scarborough *v.* Cosgrove, [1905] 2 K. B. 805, in which the C. A. refused to follow Holder *v.* Soulby, and held that there was a duty on the part of a boarding-house keeper to take reasonable care for the safety of property brought by a guest into his house."

309, *in notes. At end of note* [4], *add*—"Or from the admission by a county court judge of an unstamped document without exacting a penalty: Lowe *v.* Dorling, 1905, 74 L. J. K. B. 794."

310, *in notes. In note* [5], *line* 2, *after* "§ 416," *add*—"See also Skinner *v.* Hunt, 1902, 66 J. P. 426, and Lea *v.* Charrington, 1898, 5 T. L. R. 218."

396, *in notes. At end of note* [1], *add*—"And see Mercer *v.* Denne, [1905] 2 Ch. 538 (Stirling, L.J., at p. 564)."

438, *in text, line* 6 *from top. After* "boundary," *add*—"Nor can statements in an old survey relating to the state of the foreshore adjoining the castle of Walmer and the castle of Deal, and tending to show that a plot of land between these points was at one time subject to the flux and reflux of the sea be admissible as reputation of the non-existence of a custom over the land in question, for this is evidence of a particular fact and not of reputation of a custom.[4a]"

In notes, add—"Note [4a] Mercer *v.* Denne, [1905] 2 Ch. 538 (see particularly the judgment of Stirling, L.J., at pp. 564, 565)."

441, *in text, at line* 8 *from bottom. After* "issue," *add*—"The deposited plans of a proposed railway company, though subsequently abandoned, are admissible as evidence of reputation on a question whether there was or was not a public road across two fields shown on the plan.[4a]"

In notes. At end of note [4], *add*—"And Att.-Gen. *v.* Antrobus, [1905] 2 Ch. 188.

Insert as note [4a]—"[4a] Att.-Gen. *v.* Antrobus, supra."

In notes. At end of note [6], *add*—"See, however, post, § 1769A. Plans and charts coming from a Government Office which do not show the circumstances under which they came to be prepared are admissible neither as public documents nor as evidence of reputation: Mercer *v.* Denne, [1905] 2 Ch. 538."

442, *in notes. At end of note* [2], *add*—"And see Heath *v.* Deane, [1905] 2 Ch. 86."

494, *in text, line* 10 *from top. After* "death," *add*—"The entry must be an entry of a transaction effected or done by the person making the entry, and should be made contemporaneously with the transaction thus effected or done, that is to say, the entry must be proved to be the last step in a continuous chain of duty, and made in the usual course and routine of that duty.[2a]"

In notes, add—"Note [2a] Mercer *v.* Denne, [1905] 2 Ch. 538 (Vaughan-Williams, L.J., at p. 558)."

496, *in notes. In note* [3], *line* 4 *from bottom. After* "(Swinfen Eady, J.)," *add*—"This decision was reversed on appeal, [1905] 2 Ch. 164, on the ground that the entries were necessary for the performance of the surveyor's ultimate duty, namely, to make the report."

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497, *in text, at end of* § 700, *add*—" An ancient survey of the necessary separations of Walmer Castle which did not show what were the instructions given to the surveyor, or whether the statements in it were from personal observations or from hearsay, has likewise been rejected.[1a] "

In notes, add—" Note [1a] Mercer *v.* Denne, [1905] 2 Ch. 538."

709, *in notes. At end of note* [3], *add*—" These provisions are now, by 5 Edw. 7, c. 15 (" The Trade Marks Act, 1905 "), repealed so far as they relate to Trade Marks, and by § 22 of the Act such marks when registered, can only be assigned or transmitted in connexion with the goodwill of the business to which they relate."

946, *in text, at end of* § 1330, *add*—" This privilege extends to communications made to a solicitor for the purpose of preparing the witnesses proof for trial.[1a] "

In notes, add—" Note [1a] Watson *v.* Jones, [1905] A. C. 480."

981, *in notes. At end of note* [2], *add*—" And see the observations on this subject by Ld. Alverstone, C.J., at a Gray's Inn Moot, reported in the *Times* newspaper of 13th November, 1905."

982, *in text, at end of* § 1372E, *add*—" Note [3a]."

In notes, add—" Note [3a] Charnock *v.* Merchant, [1900] 1 Q. B. 474."

1159, *in notes. In note from previous page, line* 1. *After* " 154," *add*—" Att.-Gen. *v.* Antrobus, [1905] 2 Ch. 188."

1192, *in line* 4 *of note. After* " bye-law," *add*—" See Robinson *v.* Gregory, [1905] 1 K. B. 534."

1277, *in notes. At end of note* [4], *add*—" And see the important judgments as to what documents are admissible in evidence as *public documents*, delivered on appeal in this case, and reported [1905] 2 Ch. 538."

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A

PRACTICAL TREATISE

ON THE

LAW OF EVIDENCE.

PART I.

NATURE AND PRINCIPLES OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1.

§ 1.[1] EVIDENCE, in Law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation. The words *evidence* and *proof* are often used as synonyms. Accurate logicians, however, apply the latter term rather to the *effect* of evidence, than to evidence itself.[2] That high degree of evidence which is called *demonstration* excludes all possibility of error, and mathematical truth alone is susceptible of it. Such evidence cannot be obtained in the investigation of matters of fact, of which the most that can ever be said is, that there is no reasonable doubt concerning them.[3] In trials of fact, therefore, the true question is not, whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are proved by competent and satisfactory evidence.

[1] Gr. Ev. § 1, in great part.

[2] See Wills, Cir. Ev. 2; Whately's Log. B. ii. c. iii. § 1; N. York Civ. Code, § 1660.

[3] See Gamb. Guide, 121. Even of mathematical truths this writer justly remarks, that, though capable of demonstration, they are admitted by most men solely on the *moral evidence* of general notoriety. Id. 196. See N. York Civ. Code, § 1662.

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§§ 2, 3.

§ 2.[1] By *competent* (or admissible) evidence is meant that which the law requires, as the fit and appropriate proof in the particular case—such, for instance, as the production of a writing, where its contents are the subject of inquiry. By *satisfactory* evidence, sometimes called *sufficient* evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of an ordinary man: and so to convince him that he would venture to act upon that conviction in matters of important personal interest.[2] Questions respecting the competency or admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. The former are exclusively within the province of the court; the latter belong exclusively to the jury.[3]

§ 3.[4] The law of Evidence may be considered under three general heads, namely, *First*, The Nature and Principles of Evidence;—*Secondly*, The Object of Evidence, and the Rules which govern its production;—And, *Thirdly*, The Means of Proof, or the Instruments by which facts are established. We will also, in connection with the first head, consider what matters the courts will notice without proof; and in connection with the second and third heads, offer a few observations respecting the functions of the judge, as distinguished from those of the jury.

[1] Gr. Ev. § 2, almost verbatim.
[2] 1 St. Ev. 578.
[3] 1 Ph. Ev. 3; Carpenters' Co. *v.* Hayward, 1780, 1 Doug. 374.
[4] Gr. Ev. § 3, in great part.

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CHAPTER II.

MATTERS JUDICIALLY NOTICED, WITHOUT PROOF.[1]

§§ 4, 5.

§ 4.[2] ALL civilised nations, as members of the great family of sovereignties, give political acknowledgment of each other's existence, and general public and external relations. After such acknowledgment by their own country, the existence and titles of a state are recognised by the public tribunals and functionaries of every nation in the civilised world.[3] If, upon a civil war, one part of a nation separate from the other, and establish an independent government, the newly-formed nation cannot be recognised as such by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted.[4] The judges of each nation are bound, *ex officio*, to know whether or not their government has recognised a nation as an independent state;[5] so also they are bound to take judicial cognisance not only of the status, but also of the boundaries of foreign states,[6] and of the status of foreign sovereigns.[7]

§ 5. In like manner the judges must recognise, without proof, the common[8] and statute law,[9] and all legal claims, demands,

[1] See N. York Civ. Code, §§ 1705, 1706.

[2] Gr. Ev. § 4, in great part.

[3] United States of America *v.* Wagner, 1867, L. R. 2 Ch. 585. But the existence of states unacknowledged by the government must be proved by evidence, showing that they are associations formed for mutual defence, supporting their own independence, making laws, and having courts of justice. Yrisari *v.* Clement, 1826, 3 Bing. 432.

[4] City of Berne *v.* Bk. of Eng., 1804, 9 Ves. 347.

[5] Taylor *v.* Barclay, 1828, 2 Sim. 213. There it was falsely alleged in the bill, with the view of preventing a demurrer, that Guatemala, a revolted colony of Spain, had been recognised by Great Britain as an independent state; but the V.-C. took judicial notice that the allegation was false. See, however, contra, Dolder *v.* Bk. of Eng., 1805, 10 Ves. 285, as to which qy.

[6] Foster *v.* Globe Venture Syndicate, Limited, [1900] 1 Ch. 811 (Farwell, J.).

[7] Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149 (C. A.).

[8] Hein. ad Pand., L. xxii. t. iii. § 119.

[9] R. *v.* Sutton, 1817, 4 M. & S.

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§ 5. estates, titles, rights, duties, obligations, and liabilities existing by the common law, or by any custom, or created by any statute;[1] the rules of equity, and all equitable estates, titles, rights, duties, and liabilities,[2] together with the doctrine that whenever the rules of equity and of the common law differ, those of equity must prevail;[3] the law of nations, the law and custom of Parliament, and the privileges and course of proceedings of each branch of the legislature;[4] the prerogatives of the Crown,[5] and the privileges of the royal palaces;[6] the maritime law;[7] the ecclesiastical law;[8] the articles of war, whether in the naval,[9] the marine, or the land service,[10] including those made for the government of the forces in India,[11] the auxiliary forces,—that is, the militia, the yeomanry, and the volunteers,[12]—and also the reserve forces;[13] the rules of procedure made in pursuance of § 70 of the Army Act, 1881, "whether signified under the hand of a secretary of state" in relation to the army,[14] or promulgated by the admiralty with respect to the marines;[15] royal proclamations, such being acts of

542; "The Interpretation Act, 1889" (52 & 53 V. c. 63), § 9. As to private Acts of Parl., see 8 & 9 V. c. 113, § 3, cited post, § 7.

[1] 36 & 37 V. c. 66, § 24, sub-sect. 6; 40 & 41 V. c. 57, § 27, sub-sect. 6, Ir.

[2] See 36 & 37 V. c. 66, § 24, sub-sect. 4. See, also, as to Ireland, 40 & 41 V. c. 57, § 27, sub-sect. 4, Ir.

[3] See 36 & 37 V. c. 66, § 25, sub-sect. 11. See, also, Bustros *v.* White, 1876, 1 Q. B. D. 423, C. A.; and Palmer *v.* Palmer, 1885, 18 L. R. Ir. 192. See, also, as to Ireland, 40 & 41 V. c. 57, § 28, sub-sects. 11, 29.

[4] Lake *v.* King, 1667, 1 Wms. Saund. 131 *a*; Stockdale *v.* Hansard, 1839, 9 A. & E. 1; Wason *v.* Walter, 1869, 8 B. & S. 671; Cassidy *v.* Steuart, 1841, 2 M. & Gr. 437; Case of the Sheff. of Middlx., 1840, 11 A. & E. 273; Sims *v.* Marryat, 1851, 17 Q. B. 281; Bradlaugh *v.* Gosset, 1884, 12 Q. B. D. 271.

[5] R. *v.* Elderton, 1703, 2 Ld. Raym. 980.

[6] Id.; Winter *v.* Miles, 1808, 10 East, 578; Att.-Gen. *v.* Donaldson, 1842, 10 M. & W. 117. Hampton Court has ceased to have privileges as a royal palace, Att.-Gen. *v.* Dakin, 1869, L. R. 4 H. L. 338; R. *v.* Ponsonby, 1844, 3 Q. B. 14.

[7] Chandler *v.* Grieves, 1812, 2 H. Bl. 606, n.

[8] 1 Roll. Abr. 526; 6 Vin. Abr. 496; Sims *v.* Marryat, 1851, 20 L. J. Q. B. 454.

[9] 29 & 30 V. c. 109 ("The Naval Discipline Act, 1866," amended by "The Naval Discipline Act, 1884," 47 & 48 V. c. 39).

[10] See § 69 of "The Army Act, 1881" (44 & 45 V. c. 58). As to printing of, and amendments to the above, see 48 V. c. 8, § 8. See, also, as to the Articles of War, § 179, sub-sects. 1, 20, of the same Act as to the Royal Marines. The latter articles, it is presumed—though the Act is silent on the subject—must be judicially noticed.

[11] Id., § 180. As amended by 58 V. c. 7 ("The Army Act, 1895"), § 7.

[12] Id., §§ 175—178.

[13] Id., § 190, sub-sect. 9.

[14] Id., § 70, sub-sects. 1, 3, amended by 49 V. c. 8, § 5.

[15] Id., § 179, sub-sect. 6.

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§ 5.

State;[1] the general practice of conveyancers;[2] the custom of merchants,[3]—at least where such custom has become notorious and has been settled by judicial determinations,[4]—such, for example, as the lien which a vendor has on goods remaining in

[1] Dupays *v.* Shepherd, 1698, 12 Mod. 216. In Van Omeron *v.* Dowick, 1809, 2 Camp. 44, Ld. Ellenborough refused to take notice of a proclamation, on the ground that the *Gazette* containing it was not produced. The latter case does not go the length of the marginal note, but simply decides that, when a judge's memory is at fault, some document must be at hand to establish the fact he is called upon to notice. Copies of royal proclamations, if purporting to be printed by the Kings's printer, are admissible by 8 & 9 V. c. 113, § 3; see post, § § 7—8. They may be proved, also, in a variety of other ways. See 31 & 32 V. c. 37, § 2, cited post, § 1527.

[2] Willoughby *v.* Willoughby, 1787, 1 T. R. 772; Doe *v.* Hilder, 1819, 2 B. & Ald. 790; Doe *v.* Plowman, 1819, 2 B. & Ad. 577; Rowe *v.* Grenfel, 1824, Ry. & M. 398. Ld. St. Leonards, in 3 V. & P., 10th edit. (1839), at p. 28, observed (the passage does not appear in recent editions, in consequence of the chapter on the subject of Attendant Terms, having become of little practical importance), "It matters very little what is the opinion of any individual conveyancer; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their *settled rule of practice* has, accordingly, in several instances been adopted as the *law of the land*, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice." See, also, Howard *v.* Ducane, 1823, 1 Turn. & R. 86; Re Rosher, 1884, 26 Ch. D. 821.

[3] Erskine *v.* Murray, 1728, 2 Ld. Raym. 1542; Soper *v.* Dibble, 1696, 1 Ld. Raym. 175; Carter *v.* Downish, 1687, Carth. 83; Williams *v.* Williams, 1693, Carth. 269.

[4] Barnett *v.* Brandao, 1843, 6 M. & Gr. 630, where judicial notice was taken of the general lien of bankers on the securities of their customers in their custody, and Ld. Denman (pronouncing the judgment of the court) said, "The law merchant forms a branch of the law of England; and those customs, which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce: and when so adopted, it is unnecessary *to plead and prove* them. They are binding on all *without proof*. Accordingly we find that usages affecting bills of exchange and bills of lading, are taken notice of judicially"; and then gives as instances the judicial recognition of the general lien of factors and bankers. This judgment was afterwards reversed by the House of Lords (see Brandao *v.* Barnett, 1846, 6 M. & Gr. 630), but that portion of it which relates to judicial notice of the general lien of bankers was affirmed. In Edie *v.* E. India Co., 1761, 2 Burr. 1226, Mr. Just. Wilmot observed, "The custom of merchants is part of the law of England, and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful, and even then the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law." In support of the proposition that evidence can only be taken as to mercantile custom where the law is doubtful, the learned judge says, that Ld. Mansfield, with Denison and Foster, JJ.'s, rejected the testimony of witnesses to prove the usage, solely on the ground that the question had *already* been *solemnly settled* by two adjudications in the courts of law. See also Jones

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§ 5. his possession for unpaid purchase-money;[1] or the general lien of an innkeeper on all the property belonging to his guest for the entire amount of his bill;[2] or the general lien of bankers and factors on the securities of their customers in their custody;[3] or the practice of drawing bills of lading in sets, and of dealing with one of a set as representing the cargo independently of the rest;[4] or the usage among money dealers of treating scrip certificates payable to bearer, whether of a foreign Government or of a company, as negotiable instruments transferable on delivery;[5] or the practice of hotel-keepers holding their furniture on hire;[6] the custom of a month's notice or a month's wages, being that to which a domestic servant is entitled when dismissed otherwise than for misconduct;[7] the customs which regulate the special descent of gavelkind and borough English lands,[8] and it seems any other custom incident to such tenures;[9] the custom of law of the road, viz., that horses and carriages should respectively keep on the near or left side;[10] and the following rules with respect to navigation,—first, that ships and steamboats, on meeting "end on, or nearly end on, in such a manner as to involve risk of collision," should port their helms, so as to pass on the port, or

v. Peppercorn, 1859, 28 L. J. Ch. 158. The manner in which customs grow up and ultimately become incorporated into the common law is well explained in the judgment of Channell, J. in Moult *v.* Halliday, [1898] 1 Q. B. 125, and in the notes to Wigglesworth *v.* Dallison, 1 Sm. L. C. 10th ed. 528, at p. 540.

[1] Imperial Bk. *v.* Lond. and St. Katherine's Dock Co., 1875, 5 Ch. D. 195.

[2] Mulliner *v.* Florence, 1878, 3 Q. B. D. 484, C. A.

[3] See cases cited ante, n. [4], p. 5; also Lond. Chart. Bk. of Australia *v.* White, 1878, 4 App. Cas. 413.

[4] Sanders *v.* Maclean, 1883, 11 Q. B. D. 327.

[5] Goodwin *v.* Robarts, 1876, 1 App. Cas. 476, H. L.; Rumball *v.* Metrop. Bk., 1877, 2 Q. B. D. 194.

[6] Crawcour *v.* Salter, 1881, 18 Ch. D. 30, C. A., where the judgments use the word *custom*. The judges could not, however, have intended to decide that an invariable *custom*, in the strict meaning of the word, existed.

[7] Moult *v.* Halliday, [1898] 1 Q. B. 125 (Channell, J.), and cases cited post, § 177.

[8] 1 Bl. Com. 76; Doe *v.* Scudamore, 1705, 2 Ld. Raym. 1025; Crosby *v.* Hetherington, 1842, 4 M. & Gr. 933.

[9] Rider *v.* Wood, 1855, 24 L. J. Ch. 737, following Payne *v.* Barker, 1659, Bridg. 18. See also 36 & 37 V. c. 66, § 4, sub-sect. 6.

[10] See Leame *v.* Bray, 1814, 3 East, 593, as to carriages, and Turley *v.* Thomas, 1837, 8 C. & P. 104, as to saddle horses. See also 14 & 15 V. c. 92, § 13, Ir. The rule has been embodied by Professor Selwyn, in what an Etonian would call "Longs and Shorts:"—"Sed precor hoc posthac reminiscere, *carpe sinistram*: Dextram occurrenti linquere norma jubet." In France the law of the road is different, and horses and carriages pass on the off side.

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§ 5.

left, side of each other; next, that steamboats should keep out of the way of sailing ships; and next, that every vessel overtaking another should keep out of its way.[1] Every court will moreover take judicial notice of matters appearing in its own proceedings. Therefore, if in the course of a case it appear that an indictable conspiracy has been committed, it will take judicial notice of the fact though it be not pleaded.[2] It will also judicially notice the particular customs which have been tried, determined, and recorded in such court.[3] The customs of London, which have been certified by the recorder,[4] such, for example, as the custom of foreign attachment[5]—the custom that every shop is a market overt for the sale of goods of the same kind as usually sold there[6]—

[1] The Regulations for Preventing Collisions at Sea, containing the rules concerning lights, fog signals, steering and sailing, were embodied in a table issued originally under § 25 of 25 & 26 V. c. 63, since repealed by "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), which substitutes for it Id., § 418 (1), and of two Orders in Council, dated respectively 11th August, 1884 (printed 9 P. D. 247), as to British ships and boats, and 14th August, 1879 (printed 4 P. D. 241), as to foreign ships. As to how these regulations are to be published and proved, see § 26 of the original Act, and for this § 419 (5) of "The Merchant Shipping Act, 1894," is substituted; and by § 28 of the original Act (§ 419 (3) of "The Merchant Shipping Act, 1894"), any damage arising from the non-observance of these Regulations shall be primâ facie presumed to have been caused by the wilful default of the person in charge of the deck of such ship. See post, § 206; Gen. St. Navig. Co. *v.* Hedley, 1869, L. R. 3 P. C. 44; Dryden *v.* Allix, 1863, 1 Moo. P. C. (N.S.) 528; The Concordia, 1866, L. R. 1 A. & E. 93; The Spring, 1866, L. R. 1 A. & E. 99. As to the prior law, see Chadwick *v.* City of Dublin St. Packet Co., 1856, 6 El. & Bl. 771; Smith *v.* Voss, 1857, 2 H. & N. 97; Zugasti *v.* Lamer, 1858, 12 Moo. P. C. 331; Maddox *v.* Fisher, 1851, 14 Moo. P. C. 103; Williams *v.* Gutch, 1857, 14 Moo. P. C. 202; Tuff *v.* Warman, 1857, 27 L. J. C. P. 322. See Morrison *v.* Gen. St. Navig. Co., 1852, 22 L. J. Ex. 233; Gen. St. Navig. Co. *v.* Morrison, 1856, 22 L. J. C. P. 179; Gen. St. Navig. Co. *v.* Mann, 1855, 14 C. B. 127; Lawson *v.* Carr, 1856, 10 Moo. P. C. 162; Churchward *v.* Palmer, 1856, 10 Moo. P. C. 472; La Plata, 1855, Swab. Adm. 298; Morgan *v.* Sim, 1858, 11 Moo. P. C. 307.

[2] Scott *v.* Brown, 1892, 2 Q. B. 724.

[3] See Crawcour *v.* Salter, 1881, 18 Ch. D. 30, C. A.

[4] Crosby *v.* Hetherington, 1842, 4 M. & Gr. 933; Bruin *v.* Knott, 1842, 12 Sim. 452; Blacquiere *v.* Hawkins, 1780, 1 Doug. 380. See Blunt *v.* Lack, 1857, 26 L. J. Ch. 148. Uncertified customs of London must be proved in the High Court, though they will be judicially noticed in the City Courts: Stanton and wife *v.* Jones, 1779, 1 Doug. 380, n. 96. So, also, the K. B. Div. in Ireland will not judicially notice a custom of the Lord Mayor and Sheriff's Court in Dublin, unless certified by the recorder: Simmonds *v.* Andrews, 1839, 1 Jebb & Sy. 531 (Ir.).

[5] Certified by Starkey in 22 Ed. 4. See 1 Roll. Abr. 554 K 5; Bruce *v.* Wait, 1840, 1 M. & Gr. 39; Crosby *v.* Hetherington, 1842, 4 M. & Gr. 933; Westoby *v.* Day, 1853, 2 E. & B. 605.

[6] Certified by Sir E. Coke, 5 Rep. 83 *b* (rather fuller as L'Evesque de Worcester's case, 1594, F. Moo. 360). See Lyons *v.* De Pass, 1840, 11 A. &

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§§ 5, 6. the custom that married women may be sole traders[1]—and the custom which defines the nature of a liveryman's office,[2]—will be judicially noticed by the courts in which the certificates are recorded.[3] No one court can, however, take notice of a custom merely because it has been certified to in another.[4] Neither can judicial notice be taken of the usages prevalent among mining partnerships conducted on the cost-book principle, for the judges cannot determine without evidence the meaning of the term "cost-book principle."[5] Nor, again, will the courts take cognisance of the laws, usages, or customs of a foreign state; and even the laws of the colonies,[6] or Jersey,[7] Guernsey, or Scotland, must be proved as facts,[8] unless steps have been taken, either under the British Law Ascertainment Act, 1859,[9] or under the Foreign Law Ascertainment Act, 1861,[10] to obtain a legal opinion on the subject from a superior court of the country whose laws are under dispute.[11] The laws of Ireland being substantially the same as those of England, except where varied by statute, a very able judge has suggested that the English courts would probably judicially recognise them.[12]

§ 6. The courts will also judicially notice the following seals:—the Great Seal of the United Kingdom, and the Great Seals of

E. 326. See, also, Crane *v.* London Dock Co., 1864, 33 L. J. Q. B. 224; Hargreave *v.* Spink, [1892] 1 Q. B. 25.

[1] Lavie *v.* Phillips, 1765, 3 Burr. 1776. Local customs, as that of carting whores in London, and foreign attachment in Bristol, Exeter, Liverpool, and Chester, need not be set out on the record of a court of the city, as they are judicially noticed in the courts and of the respective cities (1 Dougl. 380, n. 96), as they also will be in a court of error. See Bruce *v.* Wait, 1840, 1 M. & Gr. 39.

[2] King *v.* Clerk, 1695, 1 Salk. 349; cited in Piper *v.* Chappell, 1845, 14 M. & W. 649.

[3] The customs as to distribution of the personal estate of intestate freemen in London, York, and other places, are abrogated by 19 & 20 V. c. 94.

[4] Piper *v.* Chappell, 1845, 14 M. & W. 649.

[5] In re Bodmin United Mines Co., 1856, 23 Beav. 370.

[6] Prowse *v.* The European & Amer. St. Shipping Co., 1860, 13 Moo. P. C. 484.

[7] Brenan's case, 1847, 16 L. J. Q. B. 289.

[8] Urquhart *v.* Butterfield, 1888, 37 Ch. D. 357, C. A.; Dalrymple *v.* Dalrymple, 1811, 2 Hagg. Cons. 54; Mostyn *v.* Fabrigas, 1774, 1 Cowp. 174; Sussex Peer. case, 1844, 11 Cl. & Fin. 114; Male *v.* Roberts, 1800, 3 Esp. 163; R. *v.* Povey, 1855, 22 L. J. M. C. 19; Woodham *v.* Edwards, 1836, 5 A. & E. 771; Wey *v.* Yally, 1704, 6 Mod. 194; Story, Confl. § 637, and cases cited in n. See also post, §§ 48, 1423—1425.

[9] 22 & 23 V. c. 63.

[10] 24 & 25 V. c. 11.

[11] See Lord *v.* Colvin, 1860, 29 L. J. Ch. 297; Login *v.* Princess of Coorg, 1862, 30 Beav. 632.

[12] Reynolds *v.* Fenton, 1846, 3 C. B. 194, explaining Ferguson *v.* Mahon, 1839, 11 A. & E. 179.

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§ 6.

England, Ireland, and Scotland respectively;[1] the King's Privy Seal and Privy Signet, whether in England, Ireland, or Scotland;[2] the Wafer Great Seal, and the Wafer Privy Seal, framed under the Crown Office Act, 1877;[3] the seal, and the privy seal, of the duchy of Lancaster; the seal, and the privy seal, of the duchy of Cornwall;[4] the seals of the old superior courts of justice; and of the Supreme Court, and its several Divisions; the seals of the old High Court of Admiralty, whether for England or Ireland;[5] of the Prerogative Court of Canterbury;[6] and of the Court of the Vice-Warden of the Stannaries;[7] the seals of all courts constituted by Act of Parliament, if seals are given to them by the Act;[8] amongst which are the seals of the Court for Divorce and Matrimonial causes in England;[9] of the Court for Matrimonial causes and matters in Ireland;[10] of the Central Office of the Royal Courts of Justice, and of its several Departments;[11] of the Principal Registry, and of the several district Registries of the Supreme Court of Judicature;[12] of the Principal Registry, and of the several district Registries of the old Court of Probate in England[13] and of the present Court of Probate in Ireland;[14] of the old[15] and new Courts of Bankruptcy;[16] of the Insolvent Debtors' Court,[17] now abolished; of the Court of Bankruptcy and Insolvency in Ireland[18] (which, since the 6th of August, 1872, has been called "The Court of Bankruptcy in Ireland);"[19] of the Landed Estates Court, Ireland;[20] of the Record of Title Office of that Court;[21] and of

[1] Lord Melville's case, 1806, 29 How. St. Tr. 707.

[2] Foggassa's case, 1349, Y. B. 24 Edw. 3, 23, cited in Olive *v.* Guin, 1658, 2 Sid. 146; Lane's case, 1587, 2 Co. Rep. 17 *b*.

[3] 40 & 41 V. c. 41, § 4.

[4] 26 & 27 V. c. 49, § 2.

[5] Green *v.* Waller, 1703, 2 Ld. Raym. 893; 24 & 25 V. c. 10, § 14, now repealed by 44 & 45 V. c. 59; 30 & 31 V. c. 114, § 21, Ir.

[6] Kempton *v.* Cross, 1735, Cas. temp. Hardw. 108.

[7] 6 & 7 W. 4, c. 106 ("The Stannaries Act, 1836"), § 19.

[8] Doe *v.* Edwards, 1839, 9 A. & E. 554.

[9] 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 13.

[10] 33 & 34 V. c. 110, § 11, Ir.

[11] R. S. C. 1883, Ord. LXI. rr. 1, 6, 7.

[12] 36 & 37 V. c. 66, § 61.

[13] 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 22.

[14] 20 & 21 V. c. 79, § 27, Ir.

[15] See 24 & 25 V. c. 134, § 204, and 32 & 33 V. c. 71, § 109.

[16] See 46 & 47 V. c. 52, § 137; and the Bankruptcy Rules of 1883, r. 12. See, also, r. 14, as to seals on "office copies."

[17] Doe *v.* Edwards, 1839, 9 A. & E. 554.

[18] 20 & 21 V. c. 60, § 362, Ir.

[19] 35 & 36 V. c. 58, § 6, Ir.

[20] 21 & 22 V. c. 72 ("The Landed Estates Court (Ireland) Act, 1858"), § 8, Ir.

[21] 28 & 29 V. c. 88, § 56, Ir.

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§ 6. the County Courts.[1] Courts of law also judicially notice the seal of the corporation of London.[2] The seal of a foreign or colonial notary public will not generally be judicially noticed, although such a person is an officer recognised by the whole commercial world.[3] Various statutes render different other seals admissible in evidence without proof of their genuineness.[4]

[1] 51 & 52 V. c. 43, § 180.

[2] Doe *v.* Mason, 1793, 1 Esp. 53.

[3] Re Earl's Trusts, 1858, 4 K. & J. 300; Re Davis's Trusts, 1869, L. R. 8 Eq. 98 (as to seal of a foreign notary public); Nye *v.* Macdonald, 1870, L. R. 3 P. C. 331 (as to seal of colonial notary public); see, however, contra, Anon., 1799, 12 Mod. 345; Hutcheon *v.* Mannington, 1802, 6 Ves. 823; Cole *v.* Sherard, 1855, 25 L. J. Ex. 59; and Furnell *v.* Stackpoole, 1829, Millward, 485 (Ir.).

[4] Such as the seals of the Local Government Board for England (34 & 35 V. c. 70, § 5); or Ireland (35 & 36 V. c. 69, § 4, Ir.); of the late Poor Law Board, 10 & 11 V. c. 109 ("The Poor Law Board Act, 1847"), § 5; 1 & 2 V. c. 56 ("The "Poor Relief (Ireland) Act, 1838"), § 221, Ir.; 10 & 11 V. c. 90 ("The Poor Relief (Ireland Act, 1847"), § 3, Ir.; of the late Local Boards of Health (11 & 12 V. c. 63, § 35; 21 & 22 V. c. 98, § 4); and of Urban Sanitary Authorities (38 & 39 V. c. 55, § 7) and Joint Sanitary Boards (38 & 39 V. c. 55, § 280; 41 & 42 V. c. 52, § 13, Ir.); of the now abolished Commissioners for the Sale of Encumbered Estates in Ireland (12 & 13 V. c. 77, § 2, Ir.; see 21 & 22 V. c. 72, § 23, Ir.); of the Land Registry Office in England (see 25 & 26 V. c. 53, § 123; see also 38 & 39 V. c. 187, § 107), whether established under the Act of 1862 or under that of 1875; of the District Registry Offices created under the Act last referred to (38 & 39 V. c. 87, § 120); of the Office for the Registration of Assurances of Lands in Ireland (13 & 14 V. c. 72, § 45, Ir.); of the Irish Land Commission (44 & 45 V. c. 49, § 42, Ir.); of the General Register Office in England (6 & 7 W. 4, c. 86, § 38; see 3 & 4 V. c. 92, § 9), or Ireland (26 & 27 V. c. 11, § 5, Ir.); of the Charity Commissioners for England and Wales (16 & 17 V. c. 137, § 6; and see 18 & 19 V. c. 124, § 4, amended by 50 & 51 V. c. 49, and § 5 thereof as to copies and certified extracts, and the presumption that sealed copies are originals); of the Railway Commissioners (51 & 52 V. c. 25, § 2); of the Commissioners of His Majesty's Works and Public Buildings (15 & 16 V. c. 28 ("The Commissioners of Works Act, 1852"), § 1; 37 & 38 V. c. 84, § 2); of the Board of Agriculture, which, speaking generally, now discharges the duties of the old Inclosure Commissioners, Copyhold Commissioners, and Tithe Commissioners (45 & 46 V. c. 38; (see 52 & 53 V. c. 30 ("The Board of Agriculture Act, 1889"), especially § 6, and see also "The Settled Land Act, 1882" (45 & 46 V. c. 38), amended by "The Settled Land Act, 1884" (47 & 48 V. c. 18)); of the Central Office of the Registry of Friendly Societies (59 & 60 V. c. 25, § 100); of the respective Commissioners for the Universities of Oxford and Cambridge (40 & 41 V. c. 48, §§ 4, 9); of the Prison Commissioners for England, and of the General Prisons Board for Ireland (40 & 41 V. c. 21, § 6, and c. 49, § 4, Ir.); of the special Commissioners for Irish Fisheries (26 & 27 V. c. 114, § 33, Ir.; continued by 31 & 32 V. c. 111; and amended by 32 & 33 V. c. 92, Ir.); of the Commissioners of Public Works in Ireland, at least for the purposes of the Drainage Acts (26 & 27 V. c. 88, §§ 3, 5, Ir.; 29 & 30 V. c. 49, § 21, Ir.), and of "The Settled Land Act, 1882" (45 & 46 V. c. 38, §§ 48, 65, sub-sect. 9); of the office established under "The Patents, Designs, and Trade Marks Act, 1883" (46 & 47 V. c. 57, § 84); and of the Record Office, whether in England (1 & 2 V. c. 94 ("The Public Record Office Act, 1838"), § 11) or in Ireland (30 & 31 V. c. 70, § 18, Ir.). In all proceedings,

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§§ 7—8. The Documentary Evidence Act, 1845,[1] extended the principle of admitting in evidence official documents without formal proof, to a numerous class of cases. That statute enacts, that "whenever *by any Act now in force or hereafter to be in force*, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence." By § 2, "all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officer, shall henceforth take *judicial notice* of the signature of any" judge of the Supreme Court of Judicature,[2] "provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document." By §. 3, "all copies of private and local and personal Acts of Parliament not public Acts, if *purporting* to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations *purporting* to be printed by the printers to the Crown, or by the printers to either House of Parliament,

§§ 7—8.

too, under the winding-up clauses of the Companies Act, 1862, the seal of any office of the Court of Chancery, or Bankruptcy, in England or in Ireland, of the Court of Session in Scotland, or of the Court of the Vice-Warden of the Stannaries, when appended to any document made, issued, or signed under those clauses, or any official copy thereof, must be judicially noticed (25 & 26 V. c. 89, § 125).

[1] 8 & 9 V. c. 113. The author naturally felt satisfaction in referring to this statute, as he originally suggested to the Law Amend. Soc. the alterations embodied therein, and prepared the bill founded on them, which was carried by Ld. Brougham.

[2] "The Judicature Act, 1873" (36 & 37 V. c. 66).

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§§ 7—10. or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."[1]

§ 9. As to colonial *laws*, an Act of 1865[2] provides that "the certificate of the clerk or other proper officer of a legislative body in any colony, to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be primâ facie evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the Governor; and any proclamation purporting to be published by authority of the Governor in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be primâ facie evidence of such disallowance or assent."

§ 10. As to foreign and colonial *documents*, Lord Brougham's Evidence Act of 1851[3] enacts, that "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal

[1] By § 4, forgery or false printing any of the documents referred to above (or, by 31 & 32 V. c. 37, § 4, cited post. § 1527 in note, any proclamation) is made a felony, punishable by penal servitude, or imprisonment for not less than a year; and it also is provided that, "whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose." § 5 enacts, that the Act shall not extend to Scotland. See 24 & 25 V. c. 98 ("The Forgery Act, 1861"), §§ 27—29.

[2] 28 & 29 V. c. 63 ("The Colonial Laws Validity Act, 1865"), § 6.

[3] 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 7.

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documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned: that is to say, if the document sought to be proved be a proclamation,[1] treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign and colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court: and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." **10—12.**

§ 11. The Commissioners for Oaths Act, 1889,[2] enables affidavits, &c., to be sworn abroad before consuls, &c.

§ 12. Order XXXVIII. of the R. S. C., 1883, provides, in Rule 6, that "all examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the

[1] See § 365 of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), and 14 & 15 V. c. 99 ("The Evidence Act, 1851"), as to proof of proclamations by governors of colonies under the first-named Act.

[2] 52 V. c. 10, post, § § 1567—8.

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§§ 12, 13. purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland, or Ireland, or the Channel Islands, or in any colony, island, plantation, or place *under the dominion of Her Majesty in foreign parts*, before any judge, court, notary public, or person lawfully authorised to administer oaths[1] in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls[2] in any foreign parts out of Her Majesty's dominions, and the judges and other officers of the High Court shall *take judicial notice* of the *seal* or *signature*, as the case may be, of any such court, judge, notary public,[3] person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document."[4]

§ 13. Again, the Bankruptcy Act for Scotland[5] (passed in 1856) facilitates the proof of certain Scottish judicial documents by enacting, in § 174, that "all deliverances,"—which term includes all orders, warrants, judgments, decisions, interlocutors, or decrees under that Act,[6]—"purporting to be signed by the Lord Ordinary, or by any of the judges of the Court of Session, or by the sheriff [or sheriff substitute],[7] as well as all extracts or copies thereof, or from the books of the Court of Session, or the Sheriff Court, purporting to be signed or certified by any clerk of court, or extracts from or copies of registers purporting to be made by the keeper thereof, or extractor, shall be judicially noticed by all courts and judges in England, Ireland, and Her Majesty's other dominions, and shall be received as primâ facie evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character

[1] In Baillie *v.* Jackson, 1853, 3 De G. M. & G. 38; the Lords Justices refused to take judicial notice of the signature of the Registrar of Deeds in St. Vincent to a certificate, he admittedly having no authority to administer an oath.

[2] If there be no consul or vice-consul accessible, an affidavit made in foreign parts may be sworn before a notary public. Cooke *v.* Wilby, 1884, 25 Ch. D. 769.

[3] See ante, p. 10, n. [3].

[4] See "The Commissioners for Oaths Act, 1889" (52 V. c. 10). And see, also, Brooke *v.* Brooke, 1881, 17 Ch. D. 833. Similar clauses to the rule above are also contained in "The Court of Admiralty (Ireland) Act, 1867" (30 & 31 V. c. 114, § 57, Ir.), and "The Matrimonial Causes (Ireland) Act, 1871" (34 & 35 V. c. 49, § 17, Ir.).

[5] 19 & 20 V. c. 79.

[6] § 4.

[7] 19 & 20 V. c. 79, § 4.

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of the person signing, and shall be sufficient warranty for all diligence and execution by law competent." §§ 13, 14.

§ 14.[1] In America, the signature of the Chief of the Executive of the State is recognised without proof.[2] In Louisiana, also, the signatures of executive and judicial officers to all official acts are similarly treated.[3] The English doctrine on this subject is difficult of definition. On the one hand, judicial notice will be taken of the royal sign manual,[4] and of matters stated under it; of matters stated in the certificate of a principal Secretary of State,[4] and of the signatures of the judges of the Supreme Court of Judicature, and of the old superior equity and common law judges, if appended to any judicial or official document.[5] The legislature has moreover provided that judicial notice shall be taken of the signatures of the judges, commissioners and registrars of the old courts,[6] and of the judges and registrars of the Courts[7] of Bankruptcy in England, and of the judges, registrars, and chief clerks of the Court of Bankruptcy and Insolvency, now called the Court of Bankruptcy,[8] in Ireland;[9] and has also directed that in all proceedings under the winding-up clauses of the Companies Act, 1862, judicial notice shall be taken of the signatures of the officers of the old Courts of Chancery in England or Ireland, or of the Courts of Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the registrar of the court of the Vice-Warden of the Stannaries, whenever such signatures are subscribed to any document made, issued, or signed, under such clauses, or any official copy thereof,[10] and that the signatures attached to certain other documents rendered admissible by statute, need not be proved.[11]

[1] Gr. Ev. § 6, in part, as to first four lines.

[2] Jones *v.* Gale's Exors., 1817, 4 Mart. 635 (Am.).

[3] Id.; Wood *v.* Fitz. 1820, 10 Mart. 196 (Am.).

[4] Mighell *v.* Sultan of Johore, (1894), 1 Q. B. 149; see also post, § 1381; Lord Melville's case, 1806, 29 How. St. Tr. 707; R. *v.* Miller, 1772, 2 W. Bl. 797, and R. *v.* Gully, 1773, 1 Leach, 98. In neither of the cases last-named was any question raised as to the necessity of proving the signature to be genuine.

[5] 8 & 9 V. c. 113, § 2, ante, § 7.

[6] 24 & 25 V. c. 134, § 204; 32 & 33 V. c. 71, § 109.

[7] 46 & 47 V. c. 52, § 137, cited ante, p. 9, n. [16].

[8] 35 & 36 V. c. 58, § 6, Ir.

[9] 20 & 21 V. c. 60, § 362, Ir.

[10] 25 & 26 V. c. 89, § 125.

[11] 8 & 9 V. c. 113, § 1, ante, § 7. A partial list of the more important of these documents will be given in Part iii. Ch. iv., on Public Documents. In practice, no proof is required of the handwriting of the governor of Holloway Prison (25 &

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§§ 14—16. On the other hand, it has been said that the Courts would probably not recognise the signatures of the Lords of the Treasury to their official letters.[1] Many bodies are, too, by particular statutes, created corporations and given a seal, for instance, County Councils;[2] yet in each such case the seal must, in the absence of statutory provision that judicial notice shall be taken of it, be formally proved.[3]

§ 15. The judges will take notice of the *London*, *Dublin*, or *Edinburgh Gazette* on its mere production, and it is unnecessary to prove that it was bought at the office of the King's printer, or to offer any evidence as to whence it came.[4]

§ 16.[5] It is unnecessary to prove facts which may certainly be known from the invariable course of nature; such as that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery.[6] Nor is it necessary to prove the course of time,[7] or of the heavenly bodies.[8] Public divisions of time, too, need not be proved, such as the ordinary public fasts and festivals;[9] the commencement or ending of the legal sittings;[10] the coincidence of the years of the reign of any sovereign of this country with the years of our Lord;[11] the coincidence of days of the week with days of the month;[12]

26 V. c. 104, § 12), which for all purposes of law is now regarded as the King's Prison. See Alcock *v.* Whatmore, 1840, 8 Dowl. 615; Short *v.* Williams, 1835, 4 Dowl. 357; Fogarty *v.* Smith, 1836, 4 Dowl. 598, n.

[1] R. *v.* Jones, 1809, 2 Camp. 131. See 12 & 13 V. c. 89 ("The Treasury Instruments (Signature) Act, 1849") cited post, § 1106; and 31 & 32 V. c. 37, cited post, § 1527.

[2] 51 & 52 V. c. 41 ("The Local Government Act, 1888"), § 79. No seal is given to parish councils, though they are incorporated. See 56 & 57 V. c. 73 ("The Local Government Act, 1894"), § 3, sub-sect. 9.

[3] See, further, post, § 87.

[4] R. *v.* Forsyth, 1814, R. & R. 274; 31 & 32 V. c. 37, §§ 2, 5, cited post, § 1527. See R. *v.* Holt, 1793, 5 T. R. 436. The case R. *v.* Wallace, 1865, 17 Ir. C. L. 206, can no longer be relied upon. See post, § 1527.

[5] Gr. Ev. § 5, in part.

[6] Heathcote's Divorce, 1851, 1 Macq. 277, H. L.; R. *v.* Luffe, 1807, 8 East, 202.

[7] See Bury *v.* Blogg, 1848, 18 L. J. Q. B. 85.

[8] However, in Collier *v.* Nokes, 1849, 2 C. & Kir. 1012, Wilde, C.J., is reported to have held that he could not judicially notice at what hour the sun set in the month of November. See, also, Tutton *v.* Darke, 1860, 29 L. J. Ex. 271. Sed qu.?

[9] 6 Vin. Abr. 492, pl. 8—44.

[10] 6 Vin. Abr. 490, pl. 32.

[11] Holman *v.* Burrow, 1702, 2 Ld. Raym. 795; R. *v.* Pringle, 1840, 2 M. & Rob. 276.

[12] 6 Vin. Abr. 492, pl. 6, 7, 8; Hoyle *v.* Ld. Cornwallis, 1720, 1 Str. 387; Page *v.* Faucet, 1591, Cro. Eliz. 227; Harry *v.* Broad, 1704, 2 Salk. 626; Brough *v.* Parkins, 1703, 2 Ld. Raym. 994. Thus the court is bound judicially to notice what days of the month fall on Sundays: Hanson *v.*

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the order of the months;[1] the meaning of the word "month."[2] The meaning of words in the vernacular language[3] need not be proved, although the court may be asked to give to a word more than one meaning; the word "time," for instance, unless specifically stated, indicating in Great Britain "Greenwich mean time," and in Ireland, "Dublin mean time";[4] and the word "distance" being, except under special circumstances, taken to mean distance measured as the crow flies.[5] Nor, again, need formal proof be given as to the legal weights and measures;[6] nor the positive value of the coin of the realm;[7] nor its relative value at different periods of time;[8] nor as to matters of history affecting the whole public.[9]

§ 17.[10] Courts also recognise the principal geographical divisions. Thus they judicially notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their

Shackelton, 1835, 4 Dowl. 48; Pearson *v.* Shaw, 1844, 7 Ir. L. R. 1.

[1] R. *v.* Brown, 1828, M. & M. 164.

[2] This formerly, at common law and in equity (see Cons. Ord. Ch. 1860, Ord. XXXVII. r. 10, now annulled), used to mean four weeks, but meant a calendar month when used in the ecclesiastical courts (Bluck *v.* Rackman, 1846, 5 Moo. P. C. 308; Man *v.* Ricketts, 1845, 14 L. J. Ch. 255; Simpson *v.* Margitson, 1847, 17 L. J. Q. B. 81; Johnstone *v.* Hudleston, 1825, 4 B. & C. 932); in mercantile transactions in the city of London (Turner *v.* Barlow, 1863, 3 F. & F. 946); or in bills of exchange or promissory notes (45 & 46 V. c. 61, § 14, sub-sect. 4, and § 89); or in any statute passed after the year 1850 (The Interpretation Act, 1889, of 52 & 53 Vict. c. 63, § 9). And month, when used in the Rules of the Supreme Court (Ord. LXIV. r. 1), or in any judgment or order of that court (Id.), unless words be added showing lunar month to be intended. As to the meaning of "calendar month" as applied to imprisonment, see Migotti *v.* Colville, 1879, 4 C. P. D. 233.

[3] Clementi *v.* Golding, 1809, 2 Camp. 25, as to the meaning of the word "book"; Com. *v.* Kneeland, 1838, 20 Pick. 229 (Am.); R. *v.* Woodward, 1831, 1 Moody C. C. 323. In the last case the judges unanimously held that they were bound to notice that *beans* were a species of *pulse*. So in R. *v.* Swatkins, 1831, 4 C. & P. 548, Patteson, J., after conferring with Bosanquet, J. judicially noticed that *barley* was *corn*, in an indictment for arson under the Act just mentioned. In R. *v.* Beaney, 1820, R. & R. 416, however, the judges refused to notice that a *colt* was an animal of the *horse* species.

[4] 43 & 44 V. c. 9, § 1; formerly local time prevailed, see Curtis *v.* March, 1858, 3 H. & N. 866.

[5] Moufflet *v.* Cole, 1872, L. R. 7 Ex. 70; 8 ib. 32.

[6] Hockin *v.* Cooke, 1791, 4 T. R. 314; O'Donnell *v.* O'Donnell, 1878, 1 L. R. Ir. 284; 41 & 42 V. c. 49.

[7] Glossop *v.* Jacob, 1815, 1 Stark. 69; Kearney *v.* King, 1819, 2 B. & Ald. 301.

[8] Bryant *v.* Foot, 1868, L. R. 3 Q. B. 497.

[9] See Read *v.* Bishop of Lincoln, 1892, A. C. 644, post, § 1785; Bk. of Augusta *v.* Earle, 1839, 13 Pet. 519, 589 (Am.).

[10] Gr. Ev. § 6, as to first seven lines, in great part.

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§ 17. own government;[1] and the local divisions of their country, such as states,[2] provinces,[3] counties,[4] counties of cities, cities,[5] towns, parishes, and the like, so far as political government is concerned or affected; and when dealing with questions of navigation, the geographical positions and the names of places as shown on the Admiralty chart.[6] But courts are not obliged to judicially notice mere local divisions, nor their precise limits (further than they may be described in public statutes[7]). Accordingly they have refused to notice judicially that "a part of the coast called Suffolk" was not in Kent; or that "Orfordness, in the county of Suffolk," was not situated between the North Foreland and Beachy Head;[8] that a particular place is within a certain city;[9] or that a particular town is within a certain diocese;[10] or that a street mentioned in the pleadings is a public thoroughfare, though the word "street," *via strata*, would rather imply that it was;[11] or that a particular street is not in a certain county, though it be notorious that a street bearing the same name is in another

[1] See "The Foreign Jurisdiction Act, 1890" (53 & 54 V. c. 37), legalising acts done in dominions acquired by 6 & 7 V. c. 94, treaty, capitulation, grant, usage, sufferance, or other lawful means. One of His Majesty's principal secretaries of state, in answer to question put by any court in the King's dominions, is required, within a reasonable time in that behalf, to cause proper and sufficient answers to be returned to all such questions, which answers shall, *upon production thereof, be final and conclusive evidence*, in the suit or other proceedings, of the several matters therein contained.

[2] Whyte *v.* Rose, 1842, 4 P. & D. 199. There the court noticed, that by "the kingdom of Ireland" was meant that part of the United Kingdom called Ireland.

[3] Id.

[4] Deybel's case, 1821, 4 B. & Ald. 243. In 2 Inst. 557, it is said "the King's courts" "take notice of all the counties of England." In R. *v.* Isle of Ely, 1850, 15 Q. B. 827, the court judicially noticed that the Isle of Ely was a division of a county in the nature of a riding, and, as such, primâ facie liable to repair bridges within it. In Harris *v.* O'Loghlen, 1871, 5 Ir. R. Eq. 514, the M. R. took judicial notice of the baronies in an Irish county, such baronies having been enumerated in 13 & 14 V. c. 68, Sch. A. (repealed by 54 & 55 V. c. 67).

[5] R. *v.* St. Maurice, 1851, 16 Q. B. 908.

[6] Birrell *v.* Dryer, 1884, 9 App. Cas. 345.

[7] Deybel's case, 1821, 4 B. & Ald. 243; Fazakerley *v.* Wiltshire, 1720, 1 Str. 1720; R. *v.* Burridge, 1735, 3 P. Wms. 497; Thorne *v.* Jackson, 1846, 3 C. B. 661.

[8] Deybel's case, 1821, 4 B. & Ald. 243. In Kirby *v.* Hickson, 1850, 1 L. M. & P. 364, the court refused to take judicial notice that Park Street, Grosvenor Square, in Middlesex, was within twenty miles of Russell Square, in the same county.

[9] In Brune *v.* Thompson, 1842, 2 Q. B. 789, where the plaintiff was nonsuited for not proving that the Tower of London was within the City of London.

[10] R. *v.* Simpson, 1738, 2 Ld. Raym. 1379.

[11] Grant *v.* Moser, 1843, 5 M. & Gr. 129.

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county;[1] or that a city mentioned in a document is in a particular country, even though it appear that one with a similar name is the capital of such country.[2] They have, however, noticed that the Queen's Prison was situated in England.[3]

§ 18.[4] The courts will, too, judicially recognise the political constitution or frame of their own government; its essential political agents or public officers sharing in its regular administration; and its essential and regular political operations and actions. Accordingly, all tribunals notice the accession and demise of the sovereign of their country;[5] the heads of departments, and the principal officers of state, whether past or present;[6] the marshals and sheriffs, but not the deputies of these functionaries;[7] the existence of a war in which their country is engaged, at least when such war is recognised in public proclamations or Acts of Parliament;[8] the days of special public fasts and thanksgivings, when recognised in like manner; the stated days of general political elections; the date and place of the sittings of the legislature;[9] and, in short, all "public matters which affect the government of the country."[10] And though they were not formerly so,[11] the journals of either House of Parliament are now evidence, if they purport to be printed by the official printers.[12] But the courts will not recognise

[1] Humphreys *v.* Budd, 1841, 9 Dowl. 1000. See Thorne *v.* Jackson, 1846, 3 C. B. 661.

[2] Kearney *v.* King, 1819, 2 B. & Ald. 301. There it was held that a declaration on a bill drawn and accepted "at Dublin, to wit, at Westminster," for 542*l.*, must be taken to be on a bill drawn in England for English money, and that therefore proof of a bill drawn "at Dublin in Ireland" for Irish money, which is of less value, was a fatal variance.

[3] Wickens *v.* Goatly, 1851, 11 C. B. 666.

[4] Gr. Ev. § 6, in part.

[5] Holman *v.* Burrow, 1702, 2 Ld. Raym. 795; R. *v.* Pringle, 1840, 2 M. & Rob. 276.

[6] R. *v.* Jones, 1809, 2 Camp. 131; Bennett *v.* The State of Tennessee, 1826, Mart. & Y. 133 (Am.); Whaley *v.* Carlisle, 1866, 17 Ir. C. L. R. 792 (where the court judicially noticed that Lord Hawkesbury had been foreign minister in 1803).

[7] See Grant *v.* Bagge, 1802, 3 East, 128.

[8] Dolder *v.* Ld. Huntingfield, 1805, 11 Ves. 292; R. *v.* De Berenger, 1814, 3 M. & S. 67. When war is neither publicly proclaimed, nor noticed in any statute, its existence is solely a question for the jury: 1 Hale, 164; Fost. C. L. d. 1, c. 2, § 12. The existence of war between foreign countries will not be judicially noticed: Dolder *v.* Ld. Huntingfield, 1805, 11 Ves. 292.

[9] R. *v.* Wilde, 1669, 1 Lev. 396; Birt *v.* Rothwell, 1697, 1 Ld. Raym. 210, 343.

[10] Taylor *v.* Barclay, 1828, 2 Sim. 213.

[11] R. *v.* Knollys, 1694, 1 Ld. Raym. 10—15.

[12] 8 & 9 V. c. 113, § 3, cited ante, § 7.

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§§ 18, 19. private orders made at the council-table;[1] nor, it seems, any orders of Council, even though they regard the Crown and the government.[2]

§ 19. Lastly, each Division of the Supreme Court is bound to judicially notice its own rules and course of proceeding;[3] the rules and practice of the other Divisions;[4] and also the limits of their respective jurisdictions,[5]—as, for instance, that the Probate, Divorce, and Admiralty Division has so far jurisdiction over the personal estate of an intestate British subject, whether situated in Ireland, the colonies, or any foreign country, that it may grant letters to administer such property, and must do so before the administrator can sue in any English Court in respect thereof.[6] All courts will further notice the privileges of their officers[7] and solicitors,[8] a term which now includes both "attorneys" and "proctors";[9] and also the fact that the assizes, though constituting for some purposes one legal day, may be continued from day to day with or without adjournment, and often occupy several natural days;[10] the existence of courts of general jurisdiction;[11] the powers of the Ecclesiastical Courts; and the jurisdiction of the Bankruptcy Courts,[12] together with all general rules under that Act, whether made by the Lord Chancellor, with the concurrence of the President of the Board of Trade, for carrying into effect its objects,[13] or made by the Board of Trade, for regulating matters of an administrative character under it, if printed by the King's printers, purporting to be issued under the authority of the Board.[14] Judicial notice must also be taken of the rules made under the Bankruptcy (Ireland) Amendment Act, 1872.[15]

[1] 6 Vin. Abr. 490.

[2] Att.-Gen. *v.* Theakstone, 1820, 8 Price, 89. See post, §§ 1527, 1664.

[3] Dobson *v.* Bell, 1676, 2 Lev. 176; Pugh *v.* Robinson, 1786, 1 T. R. 118.

[4] Lane's case, 1587, 2 Co. Rep. 17 *b*; Worlich *v.* Massey, 1605, Cro. Jac. 67; Mounson *v.* Bourn, 1648, Cro. Car. 526; Reidy *v.* Pierce, 1861, 11 Ir. C. L. R. 374; Caldwell *v.* Hunter, 1848, 10 Q. B. 85.

[5] Doe *v.* Caperton, 1829, 9 C. & P. 116. See Spooner *v.* Juddow, 1848, 6 Moo. P. C. 257.

[6] See Whyte *v.* Rose, 1842, 4 P. & D. 199.

[7] Ogle *v.* Norcliffe, 1708, 2 Ld. Raym. 869.

[8] Stokes *v.* Mason, 1808, 9 East, 426; Chatland *v.* Thornley, 1810, 12 East, 544; Hunter *v.* Neck, 1841, 3 M. & Gr. 181; Walford *v.* Fleetwood, 1845, 14 M. & W. 449.

[9] Jud. Act, 1873 (36 & 37 V. c. 66), § 87.

[10] Whitaker *v.* Wisbey, 1852, 12 C. B. 56.

[11] Tregany *v.* Fletcher, 1696, 1 Ld. Raym. 154.

[12] 46 & 47 V. c. 52, §§ 92 et seq.

[13] Id. § 127.

[14] Bankruptcy Rules, 1883, r. 257.

[15] 35 & 36 V. c. 58, § 124, Ir.

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Certain other rules made under statutory authority are likewise judicially noticed.[1]

§ 20. It is not clear whether or not the judges of the Supreme Court of Judicature are bound to notice who are the judges in inferior courts of record. The weight of American authorities is in favour of recognising them;[2] but the Court of Queen's Bench once refused to notice who was judge of the then Court of Review.[3] The Supreme Court will not, unless when called upon to review their judgments,[4] take cognisance of the customs and proceedings in inferior courts of limited jurisdiction,[5] except so far as they are regulated by statute.[6]

§ 21.[7] Where matters ought to be judicially noticed, but the memory of the judge is at fault, he resorts to such means of reference as may be at hand, and he may deem worthy of confidence.[8] Thus, if the point be a date, he may refer to an almanac;[9] if it be the meaning of a word, to a dictionary;[10] if it be the construction of a statute, to the printed copy; or, in case that appears to be incorrect, to the Parliament roll.[11] In some

[1] The principal of these are rules made by the Board of Trade under "The Gas and Water Works Facilities Act, 1873" (36 & 37 V. c. 89), § 14; those made either by Order in Council, or by the Committee of Council, under "The Crown Office Act, 1877" (40 & 41 V. c. 41), §§ 3, 5; those made by the Lord Chancellor, under "The Summary Jurisdiction Act, 1879" (42 & 43 V. c. 49), § 29; those made by the Lord Chancellor with the assistance of the Registrar, under "The Land Transfer Act, 1875" (38 & 39 V. c. 87), § 111, and "The Land Transfer Act, 1897" (60 & 61 V. c. 65), § 22; those made under "The Landlord and Tenant (Ireland) Act, 1870," either by the Court for Land Cases Reserved, or by the Privy Council in Ireland (33 & 34 V. c. 46, §§ 31, 41, Ir.); and those made by the Irish Land Commission (see 44 & 45 V. c. 49, § 50, sub-sect. 2, Ir.); and, of course, the various Rules and Orders of the Supreme Court made under the authority of the Judicature Acts.

[2] Hawks *v.* Kennebec, 1811, 7 Mass. 461 (Am.); Ripley *v.* Warren, 1824, 2 Pick. 592 (Am.); Despau *v.* Swindler, 1825, 3 Mart. (N.S.) 705 (Am.).

[3] Van Sandau *v.* Turner, 1845, 6 Q. B. 773.

[4] Chitty *v.* Dendy, 1835, 3 A. & E. 324.

[5] R. *v.* U. of Cambridge, 1736, 2 Ld. Raym. 1334, where the court refused to notice that the University Court in Cambridge proceeded according to the rules of the civil law. See, also, Lane's case, 1587, 2 Co. Rep. 17 *b*; Peacock *v.* Bell, 1667, 1 Wms. Saund. 75; and Dance *v.* Robson, 1829, M. & M. 295.

[6] As, *e.g.*, the Court of the V.-Ch. of Oxford, now regulated by 17 & 18 V. c. 81 ("The Oxford University Act, 1854"), § 45.

[7] Gr. Ev. § 6, as to first three lines.

[8] Gresl. Ev. 295.

[9] Page *v.* Faucet, 1591, Cro. Eliz. 227. See Tutton *v.* Darke, 1860, 5 H. & N. 649.

[10] Clementi *v.* Golding, 1809, 2 Camp. 25.

[11] R. *v.* Jeffries, 1722, 1 Str. 446; Spring *v.* Eve, 1677, 2 Mod. 240.

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§ 21. instances, the judge has refused to take cognisance of a fact, unless the party calling upon him to do so could produce at the trial some document by which his memory might be refreshed. Thus Lord Ellenborough[1] once declined to take judicial notice of the King's proclamation, the counsel not being prepared with a copy of the *Gazette* in which it was published; and in a case in which it became material to consider how far the prisoner owed obedience to his sergeant, and this depended on the articles of war, the judges thought that these ought to have been produced.[2] In other cases, the courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial. Thus, where[3] the question was, whether the Federal Republic of Central America had been recognised by the British Government as an independent state, a Vice-Chancellor sought for information from the Foreign Office, and the same source of information was applied to when a question arose as to the boundaries of a foreign state;[4] in a case where the judge was in doubt whether an Indian potentate was or was not an independent sovereign ruler, information was obtained from the Secretary of State for the Colonies;[5] in another case, the Court of Common Pleas directed inquiry to be made in the Court of Admiralty as to the maritime law;[6] and the same Court also once made inquiry as to the practice of the Inrolment Office in the Court of Chancery;[7] while Lord Hardwicke[8] asked an eminent conveyancer respecting the existence of a general rule of practice in the latter's profession. The judges will also, on occasions, inquire from the masters as to what is the practice at judges' chambers with reference to questions of procedure not specifically dealt with by the rules, or with reference to questions arising in the taxation of bills of costs.

[1] In Van Omeron *v.* Dowick, 1809, 2 Camp. 44.

[2] R. *v.* Withers, cited in R. *v.* Holt, 1793, 5 T. R. 446.

[3] Taylor *v.* Barclay, 1828, 2 Sim. 213. See, also, The Charkieh, 1878, L. R. 4 A. & E. 69.

[4] Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811.

[5] Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149.

[6] Chandler *v.* Grieves, 1812, 2 H. Bl. 606, n.

[7] Doe *v.* Lloyd, 1840, 1 M. & Gr. 685, acting on the authority of Worsley *v.* Filisker, 1620, 2 Roll. Rep. 119.

[8] Willoughby *v.* Willoughby, 1787, 1 T. R. 772. See, also, R. S. C. 1883, Ord. LI. rr. 7, 8.

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CHAPTER III.

HOW QUESTIONS OF FACT TRIED—FUNCTIONS OF JUDGE IN JURY TRIALS.

§ 22. With respect to trial by jury,[1] Lord Hardwicke has observed that it is of the greatest importance to the law of England, and to the subject, that the powers of the judge and jury be kept distinct. But important as this undoubtedly is, it is, even at the present day, not very perfectly effected. The general principle, that the judge must determine the law, and the

§ 22.

[1] The respective merits and demerits of trial by jury will be found impartially discussed in the Second Report of the Common Law Commissioners in 1853. The provisions now in force in the High Court (Ord. XXXVI. rr. 2—7a) are too long to set out at length here. They are discussed in detail in most of the Books on Practice. (See, *e.g.*, the Annual Practice for the current year. A list of causes and matters assigned exclusively to the Chancery Division is contained in 36 & 37 V. c. 66, § 34.) Their general effect is (Timson *v.* Wilson, 1888, 38 Ch. D. 72) that in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, a trial with a jury may be had by a party, if, when he is a plaintiff, in his notice of trial, or if, when he is a defendant, he, by notice given by him, within four days from the time of the service of notice of trial, or within such extended time as the court or a judge may allow, signify his desire to have the issues of fact tried by a judge with a jury, upon which the same shall be so tried; but that in all other cases trial without a jury is the normal mode of trial, and a jury can only be had by special order obtained under Ord. XXXVI., rr. 3 (giving power to order a trial by jury in Chancery actions), 6 (which preserves the right to have, on application within ten days after notice of trial, an order for a trial by jury in all purely common law actions: Jenkins *v.* Bushey, [1891] 1 Ch. 484), or 7a (giving general power to a judge to order trial by jury at any time). In divorce causes, by a rule made in July, 1880 (Rules in Div. and Mat. Causes, r. 205), though the rules first cited are inapplicable (Ord. LXVIII. r. 1), the action is heard, if damages be not claimed, before the court without a jury, but if damages are claimed, a common jury is as of course summoned. In either case any party may apply by summons for a direction that the cause be tried in a different manner, or by a special jury. Trials in the Admiralty Division of the High Court are almost invariably without a jury. There is, however, power (Ord. XXXVI. r. 44) to summon a jury, though it is said never to have been exercised since the Judicature Acts (see Williams and Bruce, Admiralty Practice, 449).

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§ 22. jury the fact, is not, and cannot be disputed;[1] but in the application of this principle, embarrassing questions not unfrequently

[1] In R. *v.* The Dean of St. Asaph, 1783, 21 How. St. Tr. 1033, Ld. Mansfield declared, "that the fundamental definition of trial by jury depended upon the universal maxim, ad quæstionem juris non respondent juratores; ad questionem facti non respondent judices"; and added—"Where a question can be proved by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; when, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to decide the law. . . . It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences." 21 How. St. Tr. 1039, 1040. Mr. Hargrave, in a note to 1 Co. Litt. 155 *b*, which is an elaborate essay on this subject, states that "the *immediate* and *direct* right of deciding upon questions of law is intrusted to the judges; that in a jury it is only *incidental;* that in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore, that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges." In America, Mr. Justice Story has said: "The learned counsel for the prisoner contends that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each, they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought that a jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the

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arise, from the experienced difficulty of defining with clearness the obscure and shifting boundaries of law and fact.

§ 23. The duty of a judge presiding at a trial by jury is fourfold:—First, he must decide all questions respecting the admissibility of evidence; secondly, he must instruct the jury in the rules of law, by which the evidence, when admitted, is to be weighed; thirdly, he must determine, as a legal question, whether there be any evidence fit to be submitted to the jury for their consideration; and lastly, he must explain and enforce those general principles of law that are applicable to the point at issue.[1]

§ 23A. First, then, speaking generally, all questions as to the *admissibility* of evidence are for the judge. It frequently happens that this depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the judge, and—however complicated the facts or conflicting the evidence[2]—must be adjudicated on by him *alone*.[3] For example, the judge alone must decide a question of whether a confession should be excluded on account of some previous threat or promise, and to do this has to determine, first, whether the threat or promise was really made; and, secondly, whether, if made, it was sufficient in law to warrant the exclusion of the evidence;[4] if a dying declaration be tendered, the judge alone decides whether it has been satisfactorily proved that the deceased believed, when he made it, that he was on the point of death;[5] where the receipt in

law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law,—that it is his privilege and truest shield against oppression and wrong,—I feel it my duty to state my views fully and openly on the present occasion." U.S. *v.* Battiste, 1835, 2 Sumn. 243 (Am.). See further, on this interesting subject, 2 Wynne's Eunomus; Bushell's case, 1670, 6 How. St. Tr. 999; Francklin's case, 1731, 17 How. St. Tr. 625; and R. *v.* Woodfall, 1770, 5 Burr. 2661.

[1] Among the questions propounded by the Irish Parliament to the judges of that country in 1641, was one, "whether the judge or jurors ought to be judge of the matters of fact," to which the judges replied, that, "although the jurors be the sole judges of matter of fact, yet the judges of the court are judges of the *validity of the evidence*, and of *the matters of law arising out* of the same, wherein the jury ought to be guided by them." 2 Nalson's Coll. of State Pap. 575, 582, Lond. 1683.

[2] As to this see Panton *v.* Williams, 1841, 2 Q. B. 192, cited infra, n. [3] to p. 31.

[3] Bartlett *v.* Smith, 1843, 11 M. & W. 486.

[4] See 1 Stark. r. 523, n. b., 1816.

[5] So resolved by all the judges, in two cases cited by Parke, B., in Bartlett *v.* Smith, 1843, 11 M. & W. 486; and in one case cited by Ld. Ellenborough, in R. *v.* Hucks, 1816, 1 Stark. 523. These cases virtually overrule R. *v.* Woodcock, 1787, 1

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§§ 23a, 24.

evidence of a deposition depends on the inability of the deponent to attend the trial, whether the sickness of the witness, or other special cause disabling him from attendance, has been satisfactorily proved;[1] whether the declarant in a question of pedigree has been proved to be a deceased member of the family—and this even though the relationship of the declarant happens to be the very question at issue in the cause;[2] and whether or not an attesting witness, of whose signature proof is offered, has absented himself from the trial by collusion with the opposite party.[3] In like manner the judge alone decides upon the admissibility of the evidence where the question is whether a document has been duly executed or stamped;[4] or whether it comes from the right custody;[5] or whether sufficient search has been made for it to admit secondary evidence of its contents;[6] or whether notice to produce it has been duly served;[7] or whether, in the event of its being produced under notice, it be the original paper required;[8] or whether it is protected as being a confidential communication;[9] or whether a witness objected to on the ground of unripeness or imbecility of mind is competent to give evidence.

§ 24. Again, where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in these different localities as to render evidence affecting the one admissible with reference to the other. He also has to pronounce whether acts relied on as such amount to evidence of ownership,[10] and whether evidence offered to prove an alleged general usage in trade or a custom amounts to evidence of such a usage or custom, or merely amounts to evidence of opinion of the particular witness.

Leach, 504, where Eyre, C.B., left the question to the jury.

[1] D. of Beaufort *v.* Crawshay, 1866, L. R. 1 C. P. 699.

[2] Doe *v.* Davies, 1847, 10 Q. B. 314. See Hitchins *v.* Eardley, 1871, L. R. 2 P. & D. 248.

[3] Egan *v.* Larkin, 1842, 1 Arm. M. & O. 403.

[4] Bartlett *v.* Smith, 1843, 11 M. & W. 486; Dunsford *v.* Curlewis, 1859, 1 F. & F. 702. See Stowe *v.* Querner, 1870, L. R. 5 Ex. 155.

[5] Bp. of Meath *v.* M. of Winchester, 1836, Bing. N. C. 198; Doe *v.* Keeling, 1848, 11 Q. B. 889.

[6] Bartlett *v.* Smith, 1843, 11 M. & W. 486.

[7] Harvey *v.* Mitchell, 1841, 2 M. & Rob. 366.

[8] Froude *v.* Hobbs, 1859, 1 F. & F. 612; Boyle *v.* Wiseman, 1855, 11 Ex. 360; overruling Jones *v.* Fort, 1828, M. & M. 196.

[9] Cleave *v.* Jones, 1852, 7 Ex. 421. See, also, R. *v.* Hill, 1851, 2 Den. C. C. 254.

[10] Doe *v.* Kemp, 1831, 7 Bing. 336.

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§§ 24—25.

in which case the judge should withdraw it from the consideration of the jury.[1] The general rule is, that where evidence is by law *admissible* for the determination of the point raised, the judge is bound to lay it before the jury; but that the question whether the evidence *is* admissible or not, is for the judge alone.

§ 24A. Whenever the rule just indicated applies, however, the credibility and weight of the evidence after it has been admitted are entirely for the jury, who may consider all the circumstances of the case, including those already proved before the judge, and give such evidence only the credit which, upon the whole, they think it deserves.[2] The judge merely decides whether there is, primâ facie, any reason for presenting it at all to the jury; and his decision on this point, if erroneous, may be reviewed by the court above.[3]

§ 25. Secondly,[4] it is the duty of the judge to point out to the jury any rule of law, which either renders evidence on any particular point unnecessary, or which gives any particular species of evidence peculiar weight, or which defines how a certain fact must be proved. Thus, he should distinctly explain the nature of any presumptions, which may apply to the point at issue, distinguishing such as are conclusive from those which are liable to be rebutted by counter evidence; and again, dividing this latter class into those presumptions upon which the jury are bound to act, in the absence of conflicting testimony, and those upon which it is merely expedient, or allowable, to rely. Again, if by common or statute law any document, when proved, becomes conclusive evidence of the facts it states, the judge must point out to the jury that the existence of such facts cannot be disputed or denied, and that the only question for their deliberation is, whether or not the document be duly proved. If, too, the uncorroborated testimony of a single witness be insufficient by law to establish guilt (as, for instance, in charges of treason or perjury), the judge must acquaint the jury with the nature and extent of this rule; so also, he should in actions for breach of promise of marriage acquaint the jury with the necessity of the plaintiff's evidence being corroborated by some other material

[1] Lewis *v.* Marshall, 1844, 7 M. & Gr. 743.

[2] Wellstead *v.* Levy, 1831, 1 M. & Rob. 139; Doe *v.* Davies, 1847, 10 Q. B. 314; Ross *v.* Gould, 1828, 3 Greenl. 204.

[3] Cleave *v.* Jones, 1852, 7 Ex. 421.

[4] See supra, § 23.

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§§ 25, 25a.

evidence in support of the promise.[1] Even where a conviction founded upon such testimony as the jury have before them would be strictly legal (as in the case of an accomplice becoming witness for the Crown), the judge would not properly discharge his duty unless he warned the jury against placing implicit reliance upon statements coming from such a suspicious quarter. Great caution and tact are, however, necessary on the part of the judge if he thinks it right (as he may do) to tell the jury his opinion respecting matters of fact, since this may arouse the jealous feelings of a jury, and excite them, in their anxiety to prove their independence, to pronounce a verdict[2] contrary to that which in the opinion of the judge is the verdict which they ought to pronounce.

§ 25A. Thirdly,[3] the judge must, at the close of each case, determine whether *any* evidence has been given on which the jury can *properly* find the question for the party on whom the onus of proof lies; and if no such evidence exists, he ought to withdraw the question from the consideration of the jury, and direct, either a nonsuit to be entered if the onus be on the plaintiff, or a verdict to be found if the onus be on the defendant.[4] It is not always easy to act upon this somewhat vague rule which (hardly less vaguely) is sometimes said to be that a judge should withdraw the case from the jury, unless there be *reasonable* evidence on which *reasonable* men could *reasonably* or *fairly* find a verdict.[5] But a judge will not often go astray if in every *doubtful* case he takes the opinion of the jury, and leaves the question, as to how far he was justified in thus acting, to be decided thereafter by the court. And, whenever there is conflicting evidence on a question of fact, he *must* leave the consideration

[1] 32 & 33 V. c. 68, § 2.

[2] "Few things incite me more to repel a doctrine than intolerant attempts to force it on my understanding." See Dr. Channing's Works, Vol. III., p. 319. Ld. Bacon, in his advice to Hutton, J., says, "You should be a light to jurors to open their eyes, but not a guide to lead them by their noses." Bac. Works, Vol. VII. p. 271, ed. Montagu.

[3] See supra, § 23.

[4] Ryder *v.* Wombwell, 1868, L. R. 4 Ex. 32; approved of and adopted in Metrop. Ry. Co. *v.* Jackson, 1877, 3 App. Cas. 193; in Dubl. W. & W. Ry. Co. *v.* Slattery, 1878, 3 App. Cas. 1155; and in Hiddle *v.* National Fire, &c. Co., [1896] A. C. 372 P. C.

[5] See Dublin, W. & W. Ry. Co. *v.* Slattery, 1878, 3 App. Cas. 1155. On the kindred question as to setting aside verdicts which there was no sufficient evidence to support, see Webster *v.* Friedeburg, 1886, 17 Q. B. D. 736; Solomon *v.* Bitton, 1881, 8 Q. B. D. 176.

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of it for the decision of the jury, whatever his own opinion may be respecting its weight.[1]

§ 26. Lastly,[2] the judge must explain to the jury what principles of law are applicable to the point in issue. To do this correctly, he must distinguish questions of law from questions of fact, which is, in ordinary cases, no very difficult task. For instance, on a charge of larceny, he lays down, as a general proposition of law, that all persons who take and remove the personal chattels of another without such other's consent, and with a felonious intent, are guilty of the crime charged; and then, according to the circumstances of the case, he explains, with more or less particularity, what constitutes a taking, removing, &c. These, obviously, are questions of law, and together form the major premiss of the syllogism. The jury decide whether it is proved that the goods have been taken and removed in such a manner, and with such an intent, as the judge has previously instructed them will amount to larceny. These are questions of fact, and together form the minor premiss. Lastly comes the conclusion of guilt or innocence, which may either be drawn by the jury applying to the facts which *they* find the rules of law as interpreted by the judge; or by their finding the facts specially (but not the *mere evidence* on which the facts are founded),[3] and leaving the court to apply the law to such facts, and pronounce the final decision. Simple, however, as this process appears to be, the line between law and fact has, in a certain class of cases, been very indistinctly drawn, and in these, therefore, the respective duties of the judge and jury are not clearly defined. For instance, if the question be whether a certain party had probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it may be difficult to say whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or the jury, and specious arguments are not wanting in favour of the claims of either party. In truth, the expressions

[1] Dublin, W. & W. Ry. Co. *v.* Slattery, 1878, 3 App. Cas. 1155, H. L. See, also, Metrop. Ry. Co. *v.* Jackson, 1877, 3 App. Cas. 193; post, § 37A, n. [2].

[2] See supra, § 23.

[3] Hubbard *v.* Johnstone, 1810, 3 Taunt. 209; Harwood *v.* Goodright, 1774, 1 Cowp. 91; Mires *v.* Solebay, 1678, 2 Mod. 244.

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§§ 26—28.

just mentioned constitute neither matters of fact, nor matters of law, exclusively, but are rather matters of quality or opinion, which are generally termed "mixed cases." They form, in logical phrase, the middle term, and are alike common to both the premisses, which are respectively intrusted to the judge and jury, and upon which the ultimate decision must proceed.[1]

§ 27. It is, however, necessary to see how far this subject is governed by actual decisions which have taken place on it, and as to whether the questions arising in particular cases are to be regarded as matters of law or of fact.

§ 28. A question of *probable* cause must, it is now clearly established,—albeit the wisdom of the rule has been stoutly disputed,[2]—be decided exclusively by the judge, and the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability, and the inferences to be drawn therefrom, really exist.[3] The distinction between actions for malicious prosecution and for false imprisonment is this: in the former the plaintiff must allege and prove affirmatively the non-existence of reasonable and probable cause and may consequently be nonsuited if he fails, in the opinion of the judge, to give the necessary evidence; in the latter the onus rests upon the defendant of proving that he had reasonable and probable causes and he must consequently be heard.[4] Thus, in an action for a malicious prosecution where the plaintiff has made out a primâ facie case, the jury, *if the evidence on the subject be conflicting*, may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offence which he charged; and if they negative either of these facts, the judge

[1] See, on this difficult subject, 12 Law Mag. 53—74; 1 St. Ev. 512—526.

[2] Lister *v.* Perryman, 1870, L. R. 4 H. L. 521, H. L.; Hicks *v.* Faulkner, 1881, 8 Q. B. D. 167.

[3] Michell *v.* Williams, 1843, 11 M. & W. 205; Panton *v.* Williams, 1841, 2 Q. B. 192; Hailes *v.* Marks, 1861, 30 L. J. Ex. 389; Sutton *v.* Johnstone, 1787, 1 T. R. 493; Mitchell *v.* Jenkins, 1833, 5 B. & Ad. 594; Hinton *v.* Heather, 1845, 14 M. & W. 134; West *v.* Baxendale, 1850, 9 C. B. 141; Cox *v.* English, Scottish, and Australian Bank, [1905] A. C. 168. On this subject see, generally, Abrath *v.* North Eastern R. C. 1886, 11 App. Cas. 247.

[4] Hicks *v.* Faulkner, 1881, 8 Q. B. D. 167.

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will decide as a point of law that the defendant had no probable cause for instituting the prosecution.[1] The rule of law as to the respective functions of a judge and of a jury in such cases is based on the assumption that judges are more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution.[2] It is equally binding, however numerous and complicated the facts and inferences may be.[3] Indeed, it would be impracticable to lay down any hard-and-fast rule as to what cases are "complicated." Besides, it would be inconsistent to hold that a rule, applicable to a simple case, should not equally apply where the facts were complicated.[4] Any difficulty in the application of the rule is, moreover, more apparent than real, for it rarely happens but that some leading facts exist in each case, which present a broad distinction to the view, without having recourse to the less important circumstances.[5] The judge has a right to act upon all the uncontradicted facts, and it is only where some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury.[6]

§ 29. Although, as to "*probable cause*," the question is for *the judge*, yet, on the other hand, as to the *reasonableness* of the belief or suspicion, upon which a party acts in causing an arrest

[1] Turner *v.* Ambler, 1847, 10 Q. B. 252. The absence, however, of belief must be proved by the plaintiff, and cannot be inferred from the mere fact that the defendant had made use of the charge for an unfair purpose: id. See, also, Broad *v.* Ham, 1839, 5 Bing. N. C. 722; Haddrick *v.* Heslop, 1848, 12 Q. B. 274; Heslop *v.* Chapman, 1853, 23 L. J. Q. B. 49.

[2] Fraser *v.* Hill, 1853, 1 Macq. 398.

[3] In Panton *v.* Williams, 1841, 2 Q. B. 192, Tindal, C.J., observes, "We take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, that if they find the facts proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. And we are all of opinion that it is the duty of the judge so to do." See Rowlands *v.* Samuel, 1850, 11 Q. B. 41, n.; Douglas *v.* Corbett, 1856, 6 E. & B. 514.

[4] Panton *v.* Williams, 1841, 2 Q. B. 192 (Tindal, C.J.), pronouncing judgment of the Ex. Ch.

[5] Id.

[6] Michell *v.* Williams, 1843, 11 M. & W. 205.

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§§ 29—30a.

or in detaining goods, is a question for *the jury* to decide.[1] Thus, if a magistrate, sued for false imprisonment, rely upon want of notice of action or the like, the question whether he believed, with some colour of reason, and bonâ fide, that he was acting in pursuance of his lawful authority, so as to entitle him to the protection of the statute, is, in strictness, one for the jury to determine, if the plaintiff desire their opinion to be taken on the evidence.[2] But if, as commonly happens, these questions be first submitted to the judge on an application for a nonsuit, and the plaintiff does not then desire them to be left to the jury, the plaintiff will be bound by the decision of the judge, if the court think it warranted by the evidence.[3]

§ 29A. The question whether the terms of a covenant not to carry on a business go beyond what is reasonably necessary for the protection of the covenantee under the circumstances of the case, is a question of law, and therefore for the judge and not for the jury, although there may be questions of fact, forming elements in the determination of the question, which, if they are in dispute, may have to be ascertained through the medium of the jury.[4]

§ 30. The question of *reasonable time* is a more difficult one Upon some subjects, indeed, of frequent recurrence, the legislature and the courts, for the sake of commercial convenience, have laid down precise rules as to what constitutes this. In these cases the duty of the jury is clearly confined to the simple task of ascertaining whether the facts proved fall within the rules or not.

§ 30A. For example, reasonable time for notice of dishonour of a bill of exchange has been defined by statute, codifying the law as determined by the old rulings of the courts, as follows:— In the absence of special circumstances, where the person giving and the person to receive the notice reside in the same place, the notice should be given or sent off in time to reach the latter

[1] Wedge *v.* Berkeley, 1838, 6 A. & E. 663; Annett *v.* Osborne, 1840, 2 Jebb & Sy. 376 (Ir.); Hazeldine *v.* Grove, 1844, 3 Q. B. 997; Hughes *v.* Buckland, 1846, 15 M. & W. 346.

[2] Hazeldine *v.* Grove, 1844, supra.

[3] Hazeldine *v.* Grove, 1844; Abrath *v.* North Eastern Ry. Co., 1886, 11 App. Cas. 247, supra. See post, § 38.

[4] Dowden and Pook, Ltd. *v.* Pook, [1904] 1 K. B. 45; Mallan *v.* May, 1843, 11 M. & W. 653.

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§ 30a.

on the day after the dishonour of the bill,[1] or where the persons reside in different places,[2] the notice should be sent off on the day after the dishonour of the bill, if there be a post at a convenient hour of that day,[3] and if there be no such post on that day, then by the next post thereafter.[4] Thus the holder of a bill has in general but one day to give notice to all the parties against whom he intends to enforce his remedy, though each of the indorsers in turn has *his* day.[5] The holder may avail himself of a notice duly given by any other party to the bill,[6] and an indorser of any notice duly given by the holder, or any indorser prior to himself.[7] Where the bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.[8] The holder of a cheque, or of a bill or note payable on demand, must, in general, present the instrument for payment on or before the day following that on which it was received;[9] though in these cases the term "reasonable time" may sometimes receive a different construction, regard being had to the nature of the instrument, the usage of trade, and the particular facts.[10]

[1] 45 & 46 V. c. 61 (the Bills of Exchange Act, 1882), § 49, sub-sect. 12 (*a*). Stocken *v.* Collin, 1841, 7 M. & W. 515; Smith *v.* Mullett, 1809, 2 Camp. 208; Hilton *v.* Fairclough, 1811, 2 Camp. 663; Rowe *v.* Tipper, 1853, 13 C. B. 249.

[2] 45 & 46 V. c. 61, § 49, sub-sect. 12 (*b*).

[3] Williams *v.* Smith, 1819, 2 B. & Ald. 496. See Shelton *v.* Braithwaite, 1841, 7 M. & W. 436.

[4] Geill *v.* Jeremy, 1827, M. & M. 61; Hawkes *v.* Salter, 1830, 4 Bing. 715; Bray *v.* Hadwen, 1816, 5 M. & S. 68; Wright *v.* Shawcross, 1819, 2 B. & Ald. 501, n.

[5] 44 & 45 V. c. 61, § 49, sub-sect. 14.

[6] Id. § 49, sub-sects. 3, 4; Chapman *v.* Keane, 1835, 2 A. & E. 193; Rowe *v.* Tipper, 1853, 13 C. B. 249 (Jervis, C.J.).

[7] Id. § 49, sub-sect. 4.

[8] Id. § 49, sub-sect. 13; Alexander *v.* Burchfield, 1845, 4 M. & Gr. 1066; Haynes *v.* Birks, 1804, 3 Bos. & P. 599; Scott *v.* Lifford, 1808, 9 East, 347; Langdale *v.* Trimmer, 1812, 15 East, 291; Rowe *v.* Tipper, 1853, 13 C. B. 249; Dobree *v.* Eastwood, 1827, 3 C. & P. 250.

[9] Rickford *v.* Ridge, 1810, 2 Camp. 539; Boddington *v.* Schlencker, 1833, 4 B. & Ad. 572; Moule *v.* Brown, 1838, 4 Bing. N. C. 266. See Bailey *v.* Bodenham, 1864, 16 C. B. (N.S.) 288.

[10] 45 & 46 V. c. 61, §§ 45, sub-sect. 2; 74, sub-sect. 2; and 86, sub-sect. 2.

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§§ **31, 32.** § 31. Generally, the rule as to the time thus allowed applies not only as between the parties to a cheque,[1] but as between banker and customer with regard to its presentation, unless, indeed, circumstances exist from which a contract or duty on the part of the banker to present earlier, or later, can be inferred.[2] It, however, does not apply to claims by the holder of a cheque against the drawer, unless during the delay the fund has been lost, as, *e.g.*, by the banker's failure.[3] When, however, the rule is applicable, it has been held to matter not, so far as the liability of the drawer is concerned, whether the presentation for payment be made by the party himself or by his banker. Thus, when an uncrossed cheque, given on the 10th of March, was paid into payee's bankers' on the 11th, and presented by them on the 12th, but the bankers on whom it was drawn had stopped payment early that morning, the payee failed to recover the amount of the cheque from the drawer, because the presentment for payment had not been made within a reasonable time, and the bankers at the time of their failure had sufficient funds of the drawer's to pay the cheque.[4] Had the payee in this case stipulated that his bankers' names should be crossed upon the cheque, or had the drawer discounted his cheque in the country, the result would have been otherwise, for the drawer then would have been taken as agreeing that presentment should be made through a banker, and the steps actually taken were in conformity with this course.[5] It is by statute now provided that in determining what is reasonable time for this purpose regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.[6]

§ 32. With regard to the time for the presentation of instruments for payment, it has been held that, as a general rule, an instrument payable at a banker's must be presented within

[1] See Hopkins *v.* Ware, 1869, L. R. 4 Ex. 268.

[2] Hare *v.* Henty, 1861, 10 C. B. (N.S.) 65. See Prideaux *v.* Criddle, 1869, L. R. 4 Q. B. 455.

[3] 45 & 46 V. c. 61, § 74, sub-sect. 1; Robinson *v.* Hawksford, 1846, 9 Q. B. 52; Serle *v.* Norton, 1841, 2 M. & Rob. 401, n.; Laws *v.* Rand, 1857, 27 L. J. C. P. 76. In these cases no time less than six years is deemed unreasonable.

[4] Alexander *v.* Burchfield, 1842, 7 M. & Gr. 1066.

[5] Id. (Tindal, C.J.). See 45 & 46 V. c. 61, §§ 76—82; and Heywood *v.* Pickering, 1874, L. R. 9 Q. B. 428.

[6] 44 & 45 V. c. 61, § 74, sub-sect. 2.

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banking hours;[1] and one payable elsewhere, at any time when the drawer may be expected to be found at his place of residence or business, though it be as late as eight or nine o'clock in the evening.[2] If, however, a banker appoint a person to attend at the office after banking hours for the purpose of returning an answer to a presentment, and such person does return an answer before midnight, no objection can be taken to the unreasonableness of the hour when the presentment was made;[3] and the same rule would seem to prevail if a bill be *personally presented* to the acceptor before twelve o'clock at night on the day that it falls due.[4]

§ 32A. With regard to a reasonable hour for a demand or tender of rent *on the land*, the common law is that it must, in order to create or avoid a forfeiture, be made before sunset, this being a rule of convenience adopted to prevent the necessity of one party waiting for the other till midnight. But if the tenant actually meet the lessor, either on or off the land, *at any time* of the last day of payment, and tender the rent, it will be sufficient, provided there was time before midnight to receive and count the money tendered.[5]

§ 33. The law as to what is a reasonable hour for the delivery of goods has been much discussed.[6] By "The Sale of Goods Act, 1893," it is expressly enacted (affirming the previous common law) that what is a "reasonable hour" is a question of fact.[7] Where a jury found by special verdict that certain oil, which the defendant had agreed to purchase of the plaintiffs, was tendered to the defendant (who must consequently, it is clear, have been then at his place of business) at half-past eight in the evening of the last day allowed for delivery; that there was full time for the plaintiffs to have delivered, and for the defendant to have examined, weighed, and received the whole before the next (a

[1] Parker *v.* Gordon, 1808, 7 East, 385; Elford *v.* Teed, 1813, 1 M. & S. 28.

[2] Wilkins *v.* Jadis, 1831, 2 B. & Ad. 188; Jameson *v.* Swinton, 1810, 2 Taunt. 224; Barclay *v.* Bailey, 1810, 2 Camp. 527.

[3] Garnett *v.* Woodcock, 1817, 6 M. & S. 44.

[4] See Startup *v.* Macdonald, 1841, 2 M. & Gr. 395.

[5] Startup *v.* Macdonald, 1841, 2 M. & Gr. 395 (Patterson, J., Alderson, B., Parke, B.), reversed by Ex. Ch. in 1843.

[6] Especially in Startup *v.* Macdonald, supra.

[7] 56 & 57 V. c. 71, § 29, sub-sect. 4.

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§§ **33, 34.** Sunday) morning; but that the time of tendering was unreasonably late, the Exchequer Chamber held (reversing the Common Pleas, and Lord Denman *dissentiente*), that the plaintiff was entitled to recover. Alderson, B.,[1] thus laid down the general rule:—"Wherever, in cases not governed by peculiar customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day to perform their obligation. The only qualification that I am aware of to this rule is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act at such period before the end of the last day, as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed. The party, therefore, who does not make his tender at that usual place, or during those usual hours, runs a great risk of not being able to make it at all. In this case the plaintiffs have had the good fortune to meet with the defendant, and to make a tender to him in sufficient time. And I think, under these circumstances, that the defendant was bound to accept the goods, and is liable in damages for not accepting them."[2]

§ 34. The law is, again, well settled as to what is a reasonable time to allow in giving a notice to quit. A reasonable notice to quit a yearly tenancy has for centuries, in legal construction, meant a six calendar months' notice,[3] terminating at the expiration of the current year:[4] referring, when the tenant holds

[1] In Startup *v.* Macdonald, 1841, 2 M. & Gr. 395.

[2] See to same effect judgment of Patteson, J., id.; and also the luminous judgment of Parke, B., id.

[3] That is, from one quarter day to the next but one following. The exact number of months or days does not signify. Notice on 26th March to quit on 29th September, insufficient. Notice on 28th September to quit on 25th March, sufficient. Morgan *v.* Davies, 1878, 3 C. P. D. 260.

[4] Doe *v.* Spence, 1805, 6 East, 123. It has for the last forty years been held in the county courts that a week's notice to quit is necessary, but sufficient, to terminate a weekly tenancy. Such also is the Irish law. See Harvey *v.* Copeland, [1892] 30 L. R. Ir. 412. There appears to be no express decisions on the point, however, in the English Superior Courts. See, and compare, Jones *v.* Mills, 1861, 10 C. B. (N.S.) 788; Huffell *v.* Armitstead, 1835, 7 C. &

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different portions of the premises from different days, to the day of entry on the substantial subject of the holding.[1] The Agricultural Holdings (England) Act, 1883, provides that if a holding be either agricultural, pastoral, or both, or be wholly or in part cultivated as a market garden,[2] a year's notice, "expiring with a year of tenancy," shall be necessary on every tenancy whether created before or after the commencement of that Act, unless the landlord and tenant shall have agreed *in writing* that this enactment shall not apply, in which case a six months' notice shall continue to be sufficient.[3] A mortgagor occupying by arrangement with mortgagee, is entitled not only to compensation, but to six months' notice.[4]

§ 34A. So, again, a reasonable notice to terminate service is, by law, in the case of domestic servants,—which term has been held to include huntsmen,[5] and head gardeners,[6]—a calendar month's warning.[7] This rule is inapplicable to farm servants,[8] clerks, travellers, governesses,[9] housekeepers in large hotels,[10] and the like.

§ 34B. So, the reasonable period during which a member of Parliament is entitled to freedom from arrest on civil process has, for at least two hundred years, been fixed by law at forty days before and after each session, the rule being the same in the case of a dissolution as in that of a prorogation.[11]

P. 56; and Towne *v.* Campbell, 1847, 3 C. B. 921. If the hiring be monthly, a month's notice, and if it be quarterly, a quarter's notice, will apparently be necessary. Towne *v.* Campbell, 1847, 3 C. B. 921. See, also, Kemp *v.* Derrett, 1814, 3 Camp. 510; Right *d.* Flower *v.* Darby, 1786, 1 T. R. 162; Bridges *v.* Potts, 1864, 17 C. B. (N.S.) 314.

[1] Doe *v.* Snowdon, 1769, 2 W. Bl. 1224; Doe *v.* Spence, 1805, 6 East, 123; Doe *v.* Watkins, 1806, 7 East, 551; Doe *v.* Rhodes, 1843, 11 M. & W. 600. In this last case the question raised, but not decided, was whether, where a tenant held a farm from year to year,—the land from 2 Feb., the house from 1 May,—a notice to quit the whole, given half a year before 2 Feb., was sufficient to entitle the landlord to recover the whole in ejectment, on a demise dated 3 Feb. The inclination of Ld. Abinger's opinion appears to have been towards the affirmative.

[2] 46 & 47 V. c. 61, § 54. See also 39 & 40 V. c. 63, Ir., as to the corresponding law of Ireland.

[3] 46 & 47 V. c. 61, § 33. See also § 41.

[4] 53 & 54 V. c. 57, § 2.

[5] Nicoll *v.* Greaves, 1864, 33 L. J. C. P. 259.

[6] Nowlan *v.* Ablett, 1835, 2 C. M. & R. 54.

[7] Nowlan *v.* Ablett, 1835, 3 C. M. & R. 54; Fawcett *v.* Cash, 1834, 5 B. & Ad. 904.

[8] Lilley *v.* Elwin, 1848, 11 Q. B. 742.

[9] Todd *v.* Kerrick, 1852, 8 Ex. 151. See post, § 177.

[10] Lawler *v.* Linden, 1876, Ir. R. 10 C. L. 188.

[11] Goudy *v.* Duncombe, 1847, 1 Ex. 430; In re Anglo-French Co-operative Soc., 1880, 14 Ch. D. 533; Re

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§§ 35, 35a.

§ 35. Again, the reasonable time for which a party charged with an *indictable* offence may, in England or Ireland, be remanded is limited by statute to eight clear days, where the accused is remanded by warrant, or, in England, to three clear days, where he is remanded by verbal order.[1] This rule does not apply where justices have power to deal *summarily* with a case which is also indictable. In such a case the remand may, by express enactment,[2] be to "the next practicable sitting" of the Petty Sessions Court, though this may be more than eight days off. If, in any case not expressly provided for, the question arise whether a party has been remanded for a reasonable time, the statutory rule would doubtless be considered by the court as furnishing some guide. But, meanwhile, the jury would, no doubt, be called upon (as in the case of probable cause) to ascertain the existence of the facts, and to leave the court to determine, upon those facts, whether the time was reasonable or not.[3] On three occasions, indeed—two in England,[4] and the other in Ireland[5]—the entire question appears to have been submitted to the jury. But the latter[6] of the two English cases rested upon the authority of the former, and in the former no objection was taken at Nisi Prius to the summing-up of the judge, though its correctness was questioned on a subsequent motion in Banc, and at the second trial the course suggested above was distinctly adopted.[7]

§ 35A. Finally, the questions whether an arrest has been countermanded within a reasonable time,[8] or whether an executor has had reasonable time to remove the goods from the testator's mansion,[9] are in each case for the judge.[10]

Armstrong, Exp. Lindsay, [1892] 1 Q. B. 327.

[1] 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 21. See, as to the Irish law, 14 & 15 V. c. 93, § 14, Ir.

[2] 42 & 43 V. c. 49, § 24, sub-sect. 2.

[3] Davis *v.* Capper, 1829, 4 C. & P. 134 *a*.

[4] Davis *v.* Capper, 1829, 4 C. & P. 134A, 138; Cave *v.* Mountain, 1840, 1 M. & Gr. 260.

[5] Gillman *v.* Connor, 1840, 2 Jebb & Sy. 210 (Ir.).

[6] Cave *v.* Mountain, 1840, 1 M. & Gr. 260. Moreover, Ld. Abinger, who tried the cause, was, "under all the circumstances, satisfied with the verdict," so that the propriety of his leaving the question to the jury could not practically be questioned in the court above.

[7] Davis *v.* Capper, 1829, 4 C. & P. 134 *a*.

[8] Scheibel *v.* Fairbairn, 1799, 1 Bos. & P. 388, where Heath, J., held that a countermand ought to be made in the course of the day on which the debt was received.

[9] Co. Lit. § 69, and p. 56 *b*.

[10] In an action against a sheriff for escape under the old law, which is now no longer maintainable (50 &

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§ 36. While there are fixed rules of law as to what is a reasonable time for certain matters, the question appears to be, with respect to some others, governed by no precise rules, and to be purely a matter for a jury to determine. Thus it is for a jury to say whether a crop has been left on the ground for a reasonable time, so as to enable the tithe-owner to compare the tithe set out with the remainder of the produce;[1] whether a copy of a rate has been delivered by an overseer to an inhabitant within such reasonable time as to satisfy the Act,[2] which requires it to be given "forthwith" upon demand and tender of payment;[3] whether the vendor of railway shares has offered to transfer them within a reasonable time;[4] whether the owner of cattle, which have strayed on land through defect of the proprietor's fences, has removed them within a reasonable time;[5] whether goods purchased by sample have been rejected,[6] or goods taken by distress have been sold,[7] within a reasonable time; whether a foreign or inland bill of exchange payable at or after sight has been presented;[8] whether a blank stamped acceptance has been filled up by the holder;[9] whether a voyage insured has been commenced or prosecuted,[10] or whether costs have been taxed, § 36.

51 V. c. 55 ("The Sheriffs Act, 1887"), § 16; and 40 & 41 V. c. 49, § 43, Ir.) the question whether his officer had or had not been guilty of unreasonable delay in taking the party arrested to prison was likewise one for the judge: Benton *v.* Sutton, 1797, 1 Bos. & P. 24.

[1] Facey *v.* Hurdom, 1824, 3 B. & C. 213.

[2] 17 G. 2, c. 3 ("The Poor Rate Act, 1743"), § 2.

[3] Tennant *v.* Bell, 1846, 16 L. J. M. C. 31.

[4] Stewart *v.* Cauty, 1841, 10 L. J. Ex. 348.

[5] Goodwyn *v.* Cheveley, 1859, 28 L. J. Ex. 298.

[6] Parker *v.* Palmer, 1821, 4 B. & Ald. 387.

[7] Pitt *v.* Shew, 1821, 4 B. & Ald. 206.

[8] Muilman *v.* D'Eguino, 1795, 2 H. Bl. 564; Fry *v.* Hill, 1817, 7 Taunt. 397. See, ante, § 30A. In determining this question, the jury should be directed to take into consideration the interests not only of the drawer, but of the holder also. Ramchurn Mullick *v.* Luckmeechund Radakissen, 1854, 9 Moo. P. C. 46; Mellish *v.* Rawdon, 1832, 9 Bing. 416. See Chart. Merc. Bk. of India, &c. *v.* Dickson, 1871, L. R. 3 P. C. 574; and Van Dieman's Land Bk. *v.* Victoria Bk., 1871, L. R. 3 P. C. 526. Also, by § 45, sub-sect. 2, of "The Bills of Exchange Act, 1882" (45 & 46 V. c. 61), regard must be had to the "nature of the bill, the usage with regard to similar bills, and the facts of the particular case."

[9] Temple *v.* Pullen, 1853, 22 L. J. Ex. 151. The question of reasonable time does not arise when the bill is in the hands of a bonâ fide indorsee for value without notice. Montague *v.* Perkins, 1853, 22 L. J. C. P. 187.

[10] Mount *v.* Larkins, 1831, 8 Bing. 108; Phillips *v.* Irving, 1844, 13 L. J. C. P. 145, where it was said that "no certain or fixed time could be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time

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§§ 36—37a.

within such time.[1] The last-named questions, indeed, turn upon the ordinary course of business or trade, and are, consequently, matters with which the jury are peculiarly acquainted.

§ 37. Having now considered how questions of "reasonable time" are to be dealt with, when they are solely for the decision of the judge, and when they must be left to the jury, we next must consider how questions of *reasonable skill or care, due diligence, and gross negligence* are to be dealt with.

§ 37A. Now questions of the description just mentioned must, in the great majority of instances, be solely determined by the jury.[2] The judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, in actions against a surgeon for negligence in the treatment of patients,[3] against gratuitous bailees for gross carelessness in losing property intrusted to them,[3] and in like cases, even when the jury have found a verdict in opposition to the opinion of the presiding judge, the court must generally refuse to grant a new trial.[4] In some cases, indeed, where the question relates to matters of legal practice, as, for instance, if a sheriff be charged with neglect of duty in not executing a writ, or if a solicitor be sued for negligence in conducting an action,[5] the judges would appear to be

allowed must vary with the varying circumstances, which may render it more or less difficult to obtain such cargo." Id. (Tindal, C.J.).

[1] Burton *v.* Griffiths, 1843, 11 M. & W. 817.

[2] In the Metropol. Ry. Co. *v.* Jackson, 1877, 3 App. Cas. 193, Ld. Cairns, C., in H. L., thus explained these principles:—"The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that the separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." See, also, ante, § 22; Bridges *v.* N. Lond. Ry. Co., 1874, L. R. 7 H. L. 213; Robson *v.* N. East. Ry. Co., 1876, 2 Q. B. D. 85, C. A.; Rose *v.* N. East. Ry. Co., 1876. 2 Ex. D. 248, C. A.

[3] Doorman *v.* Jenkins, 1834, 2 A. & E. 260.

[4] Doorman *v.* Jenkins, 1834, 2 A. & E. 256, per Cur., commenting on and explaining Shiells *v.* Blackburne, 1789, 1 H. Bl. 158; Moore *v.* Mourgue, 1776, 2 Cowp. 479.

[5] In Godefroy *v.* Dalton, 1830, 6 Bing. 460, the judges laid down, that in an action for negligence against him, a solicitor is, generally speaking,

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more competent than a jury to decide whether the facts proved amount to a want of reasonable care; but it seems that, even in such cases, the province of the judge is merely to inform the jury for what species of degree of negligence the defendant is answerable,[1] and what duty in the particular case devolved upon him, by law, or practice; and, having done this, to leave the jury to decide, first, whether the defendant has performed his duty, and next, whether, in case of non-performance, the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining or sustaining an action.[2] The judges are, however, the proper parties to decide whether fines, customs, or services are reasonable,[3] whether deeds contain reasonable covenants or powers,[4] or whether contracts in restraint of trade are, or are not reasonable.[5]

§ 38. Questions of *bona fides*,[6] *actual knowledge*,[7] *express malice*,[8] *real intention*,[9] or *reasonable cause*, next require consideration. Generally speaking, all questions of this description belong absolutely to the jury. To this rule there are, however, some few exceptions. Thus, the law will sometimes *presume* the existence of fraud, knowledge, malice, intention, or justification, from the proof of other remote facts,[10] and whenever these

"liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause, as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in a higher branch of the profession of the law."

[1] See case cited in preceding note.

[2] Hunter *v.* Caldwell, 1847, 16 L. J. Q. B. 274; Reece *v.* Rigby, 1821, 4 B. & Ald. 202; Sherlock *v.* Passman, 1836, 7 C. & P. 292.

[3] Co. Lit. 56 *b*, 59 *b*; Wilson *v.* Hoare, 1839, 10 A. & E. 236; Bell *v.* Wardell, 1740, Willes, 202.

[4] Smith *v.* Doe *d.* Jersey, 1819, 2 B. & P. 592.

[5] Haynes *v.* Doman, [1899] 2 Ch. 13.

[6] See ante, § 29; and see also Wedge *v.* Berkeley, 1837, 6 A. & E. 663; Moore *v.* Mourgue, 1776, 2 Cowp. 479; Gray *v.* Dinnen, 1840 2 Jebb & Sy. 265 (Ir.); Coxhead *v.* Richards, 1846, 15 L. J. C. P. 278; Haseldine *v.* Grove, 1842, 12 L. J. M. C. 10; Hughes *v.* Buckland, 1846, 15 L. J. Ex. 233; Horn *v.* Thornborough, 1849, 18 L. J. Ex. 349; Douglas *v.* Ewing, 1857, 6 Ir. C. L. 397.

[7] Harratt *v.* Wise, 1830, 9 B. & C. 712.

[8] As in actions for malicious prosecution or arrest. Mitchell *v.* Jenkins, 1833, 5 B. & Ad. 594.

[9] Doe *v.* Wilson, 1809, 11 East, 56; Powis *v.* Smith, 1822, 5 B. & Ad. 850; Doe *v.* Batten, 1775, 1 Cowp. 243; Zouch *v.* Willingale, 1790, 1 H. Bl. 312; Cox *v.* Reid, 1849, 18 L. J. Q. B. 216; R. *v.* Drewett, 1905, 69 J. P. 37.

[10] See Chap. 5 "On Presumptive Evidence," post.

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§§ 38, 39. presumptions are embodied in rules of law, the court will either draw the inference without the aid of a jury, or the jury will be bound to follow the directions of the judge. Moreover, in some particular cases the decision of questions of *bona fides*, *reasonable cause*, *&c.*, actually belongs to the judge. For example, in cases where by law notice of action is still required,[1] the judge has to decide whether notice of action is necessary, and consequently the question of *bona fides* must be determined by him, and not by the jury;[2] and, on an application at Nisi Prius for an amendment it is the duty of the judge to determine, as a matter of fact, from the pleadings and the evidence, what is the real question in controversy between the parties.[3] Again, questions of *discretion*, or of *good cause*, in connection with costs, are for the decision of the judge. Thus, where, in an action in the High Court, the plaintiff in an action of contract recovers (except by summary judgment under R. S. C., Ord. XIV.) a sum not over 20*l.*, or between 20*l.* and 100*l.*, or in an action of tort recovers not over 10*l.*, or between 10*l.* and 20*l.*, he is, in each case, not entitled in the first event to any costs, or, in the other, to more than County Court costs, unless the judge certify that there was *sufficient reason* for bringing the action to the High Court, subject, indeed, to a power in the High Court or at Chambers to allow costs.[4]

§ 39. The judge's discretion must, however, be exercised subject to a rule[5] which provides that—"Subject to the provisions of the Acts[6] and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who

[1] In many cases it is not now required, but defendant must instead be given an opportunity of tendering amends. See post, § 63.

[2] Kirby *v.* Simpson, 1854, 23 L. J. M. C. 165; Arnold *v.* Hamel, 1854, 23 L. J. Ex. 137.

[3] Wilkin *v.* Reed, 1854, 22 L. J. C. P. 193.

[4] See § 116 of "The County Courts Act, 1888" (51 & 52 V. c. 43), as amended by "The County Courts Act, 1903" (3 Ed. 7, c. 42, § 3). Whether for the purpose an action of detinue is one of tort or of contract depends on the facts of the particular case. Bryant *v.* Herbert, 1877, 3 C. P. D. 189, 389, C. A.; R. S. C. 1883, Ord. LXV. r. 12.

[5] R. S. C. 1883, Ord. LXV. r. 1.

[6] These are "The Sup. Ct. of Judic. Acts, 1873 to 1879, and 1881," and "The App. Jurisd. Act, 1876." See Ord. LXXI. r. 1.

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has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund, to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a *jury*, the *costs shall follow the event*, unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for *good cause*, otherwise order."[1]

§ 39A. Under the above Rule, when a cause is tried with a jury, the presiding judge may "*for good cause*" deprive a successful litigant of costs, either on an application being made to him for that purpose, or of his own motion.[2] An application to the judge for this purpose should be made either during the trial, or within a reasonable time after its termination;[3] and an application to the court must—to be successful—be made without undue delay, but may be entertained by the court, whether a previous application to the judge who tried the cause has or has not been made.[4] In no case will either the judge or the court deprive the successful litigant of his costs unless for good cause.[5] The judge, in exercising his discretion, *must assume the truth of the facts found by the jury*, but is not confined to the consideration of the party's conduct in the course of the litigation, and may consider such of his previous acts as have conduced to the action.[6]

[1] Quære, Does this Rule extend to the Liverpool Passage Court? See King *v.* Hawksworth, 1879, 4 Q. B. D. 371; and 36 & 37 V. c. 66, § 91.

[2] Turner *v.* Heyland, 1879, 4 C. P. D. 432; Collins *v.* Welch, 1879, 5 C. P. D. 27; Marsden *v.* Lanc. & York. Ry. Co., 1881, 7 Q. B. D. 641, C. A.

[3] See Kynaston *v.* Mackinder, 1870, 47 L. J. Q. B. 76, C. A.

[4] See Myers *v.* Defries, 1879, 4 Ex. D. 176, and Siddons *v.* Lawrence, 1879, 4 Ex. D. 176, C. A.; Bowey *v.* Bell, 1878, 4 Q. B. D. 95; Gen. St. Nav. Co. *v.* Lond. & Ed. Ship. Co., 1877, 2 Ex. D. 467.

[5] Everything which increases the litigation and the costs, and which places upon the defendant a burthen which he ought not to bear in the course of that litigation, is "good cause for depriving plaintiff of his costs." Huxley *v.* West London Ry. Co., 1889, 14 App. Cas. 26. See also Williams *v.* Ward, 1886, 55 L. J. Q. B. 566, C. A.

[6] Harnett *v.* Vise, 1880, 5 Ex. D. 307, C. A.; Bostock *v.* Ramsey Urban Council, [1900] 2 Q. B. 616, C. A. In Jones *v.* Curling, 1884, C. A., it was held, 1st, that the facts must show that it would be more just to disallow than to allow the costs, as, for instance, that there has been oppression or misconduct on the part of the successful litigant; 2nd, that the question of costs is one respecting which an appeal will lie. Where the case is tried without a jury there must still be some grounds to justify the judge in exercising his discretion to deprive a successful party of costs, and the fact that the party insists upon his strict legal rights and

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In an action in which the defendant succeeds, he ought not to be deprived of costs in the King's Bench Division, simply because such a result would have followed in the old Court of Admiralty.[1] To ascertain whether there is or is not "good cause" the judge may not look at communications made "without prejudice."[2] If there is any evidence of "good cause" the Court of Appeal cannot review the exercise of the judge's discretion,[3] and notwithstanding that a defendant may by statute be entitled to solicitor's and client's costs should he obtain a judgment, the judge may nevertheless deprive him of his costs for "good cause."[4]

§ 39B. Attempts to determine the "*event*," which, in the absence of a special order, costs are to "follow," have given rise to much controversy.[5] In a general way it means the result of all the proceedings incidental to the litigation; so that among the costs which follow it will be included the costs of all stages of that litigation,—for example, the costs of a first trial when a second has been ordered.[6] When a plaintiff has united several independent causes of action, and has succeeded on some of the issues and failed on the others, the term "event" is to be read distributively, and the plaintiff will have only the general costs of the cause, while the defendant will get the costs of those issues on which he succeeds,[7] although the fact of the great majority of the issues being found for the defendant *may* be "good cause" for depriving plaintiff of the general costs of the cause.[8]

§ 40. Questions as to the construction of written documents

refuses to leave the matter to the judge as arbitrator (Civil Service Co-operative Soc. *v.* Gen. Steam Navigation Co., [1903] 2 K. B. 756) or sets up the Gaming Act (Granville *v.* Firth, 1903, 19 T. L. R. 213) is not such a ground.

[1] Gen. St. Nav. Co. *v.* Lond. & Ed. Ship. Co., 1877, 2 Ex. D. 467.

[2] Walker *v.* Wiltshire, 1889, 23 Q. B. D. 335, C. A.

[3] Jones *v.* Curling, 1884, 13 Q. B. D. 262, C.A.; Huxley *v.* West London Extension Ry. Co., 1889, 14 App. Cas. 26, H. L.; Bostock *v.* Ramsey Urban Council, [1900] 2 Q. B. 616, C. A.

[4] Bostock *v.* Ramsey Urban Council, supra.

[5] See Collins *v.* Welch, 1879, 5 C. P. D. 27, C. A.; and Myers *v.* Defries, 1879, 4 Ex. D. 176.

[6] Field *v.* Gt. North. Ry. Co., 1878, 3 Ex. D. 261; Harris *v.* Petherick, 1879, 4 Q. B. D. 611, C. A.; Creen *v.* Wright, 1877, 2 C. P. D. 354, C. A.

[7] Myers *v.* Defries, 1880, 4 Ex. D. 176, C. A.; Ellis *v.* Desilva, 1881, 6 Q. B. D. 521, C. A.; Sparrow *v.* Hill, 1881, 7 Q. B. D. 362.

[8] Forster *v.* Farquhar, [1893] 1 Q. B. 564.

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§ 40.

must next be discussed. Matters of great nicety arise in connection with this subject. But the clear general rule is that the construction of all written documents is for the court alone. The construction of these is, as we have said, for the court alone so soon as the true *meaning of the words*[1] in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury;[2] and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained;[3] or conditionally, when those words or circumstances are necessarily referred to them. The term "written documents" includes Acts of Parliament, judicial records, deeds, wills, negotiable instruments, agreements, and letters. A misconstruction by the court is the proper subject of appeal to a court of error; but a misconstruction by the jury cannot in any way be effectually set right.[4] The effect of the rule consequently is to render the law certain. A marked instance of its application occurs in the case of the construction of the specification of a patent, for though the interpretation of such an instrument,—relating as it does to matters of science and skill,—would seem peculiarly adapted to the practical information of jurors, the court must construe it[5] after merely ascertaining from the jury an

[1] See Ashforth *v.* Redford, 1873, L. R. 9 C. P. 20; Alexander *v.* Vanderzee, 1872, L. R. 7 C. P. 530. But see Bowes *v.* Shand, 1877, 2 App. Cas. 455; affirming Shand *v.* Bowes, 1876, 1 Q. B. D. 470.

[2] See Tamvaco *v.* Lucas, 1862, 31 L. J. Q. B. 296; Lyle *v.* Richards, 1866, 35 L. J. Q. B. 214; D. of Devonshire *v.* Neill, 1877, 2 Ir. L. R. 132.

[3] Key *v.* Cotesworth, 1852, 22 L. J. Ex. 4. See, also, Lang *v.* Smith, 1831, 7 Bing. 284, as to mercantile usage.

[4] Judgment in Neilson *v.* Harford, 1841, 11 L. J. Ex. 20.

[5] Neilson *v.* Harford, 1841, 11 L. J. Ex. 20; Bovill *v.* Pimm, 1856, 11 Ex. 718. These cases virtually overrule Hill *v.* Thompson, 1817, 3 Mer. 630, where Ld. Eldon observed, that the *intelligibility of the description* of a specification was a matter of fact. In America the sufficiency of the description in a specification is still left as a question of fact to be determined by the jury, unless the statement be obviously too vague. Wood *v.* Underhill, 1847, 5 How. S. Ch. R. 1, 4 (Am.). But in England, where in a patent cause the want of novelty appears distinctly from documents, such, for instance, as a prior patent and specification, the judge, and not the jury, must notice the identity of the two supposed inventions, and the consequent want of novelty in the second. Bush *v.* Fox, 1856, 5 H. L. Cas. 707; Booth *v.* Kennard, 1858, 26 L. J. Ex. 305; Hills *v.* London Gaslight Co., 1860, 29 L. J. Ex. 409; Betts *v.* Menzies, 1859, 1 E. & E. 990. See, too, Betts *v.* Menzies, 1862, 31 L. J. Q. B. 233, H. L.; and Seed *v.* Higgins, 1860, 30 L. J.

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§ 40. explanation of technical terms.[1] Again, the construction of all written contracts is for the court. Where a contract for the sale of barley was in letters, one of which offered *good* barley, and the other accepted the offer, "expecting you will give us *fine* barley and good weight," it was held, that the jury (though they might be asked as to the mercantile meaning of the words "good" and "fine"), after having found that there was a distinction between the two terms employed, could not further decide that the parties did not misunderstand each other, but that they were bound to take the interpretation of the contract, as a matter of law, from the judge.[2] So, too, it is for the court to decide, as matter of law, whether the sum mentioned in an agreement as to be paid for a breach thereof[3] is a penalty or liquidated damages;[4] whether a letter containing no words of doubtful trade meaning, and as to which the extrinsic facts are not in controversy, amounts to a guarantee;[5] or whether[6] a written acknowledgment of a debt,[7] or of title,[8] is sufficient to take the case out of the Statutes of Limitation.[9] Moreover, whenever a document is connected with other evidence affecting its construction, the whole must be submitted to the jury together.[10]

Q. B. 314, H. L. But see also the observations of Ld. Westbury, C., on Bush *v.* Fox, 1856, 25 L. J. Ex. 251, and the law supposed to be there laid down, in Hills *v.* Evans, 1862, 31 L. J. Ch. 461.

[1] Hills *v.* Evans, 1862, 31 L. J. Ch. 461.

[2] Hutchison *v.* Bowker, 1839, 9 L. J. Ex. 24, where Parke, B., observed, "It is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the *jury* to say what the *meaning of those expressions* was, but for the *court* to decide what the *meaning of the contract* was." See also Bourne *v.* Gatliffe, 1841, 3 M. & Gr. 643, 689; Griffiths *v.* Rigby, 1856, 25 L. J. Ex. 284; Hills *v.* London Gaslight Co., 1858, 27 L. J. Ex. 60; Kirkland *v.* Nisbet, 1859, 3 Macq. 766; Montgomery *v.* Middleton, 1862, 13 Ir. C. L. R. 173.

[3] See Wallis *v.* Smith, 1882, 21 Ch. D. 243.

[4] Sainter *v.* Ferguson, 1849, 18 L. J. C. P. 217. Formerly this was occasionally left to the jury. See Crisdee *v.* Bolton, 1827, 3 C. & P. 240. As to what is a penalty and what are liquidated damages, see Wilson *v.* Love, [1896] 1 Q. B. 626, C. A.

[5] Bk. of Montreal *v.* Munster Bk., 1876, Ir. R. 11 C. L. 47.

[6] See, contra, Lloyd *v.* Maund, 1788, 2 T. R. 760; Linsell *v.* Bonner, 1835, 2 Bing. N. C. 241.

[7] Morrell *v.* Frith, 1838, 7 L. J. Ex. 172; Routledge *v.* Ramsay, 1838, 7 L. J. Q. B. 156.

[8] Doe *v.* Edmonds, 1840, 6 M. & W. 302.

[9] Morrell *v.* Frith, 1838, 3 M. & W. 402.

[10] Routledge *v.* Ramsay, 1838, 8 A. & E. 202; Morrell *v.* Frith, 1838, supra; Moore *v.* Garwood, 1849, 19 L. J. Ex. 15; Ashpitel *v.* Sercombe, 1850, 19 L. J. Ex. 82; Foster *v.* Mentor Life Ass. Co., 1854 23 L. J. Q. B. 145.

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§ 41. Letters, as mentioned in the preceding section, fall within the general rule as to "written documents."[1] Their construction, consequently, unless, indeed, extrinsic circumstances be capable of explaining them, is for the court, no matter how ambiguous the language in which they are couched.[2] If, however, letters be written in so dubious a manner as to bear different constructions, but can be explained by other transactions, the jury (who are clearly the judges of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves) must decide upon the whole evidence.[3] Accordingly, on a question whether the defendant had adopted the acceptance of a bill, the construction of a letter written by him on the subject, taken in connection with his subsequent conduct, was held to be entirely for the jury.[4] Whenever, too, a contract has to be made out partly by letters, and partly by parol evidence, the jury must deal with the whole question.[5] If a document be lost, and oral evidence be given of its contents, the judge must construe its meaning in the same manner as if it had been produced, but here again the jury may be asked if they believe oral evidence which has been given as to the circumstances of the alleged loss.[6]

§ 42. An exception to the general rule of law which intrusts the judge with the construction of all written documents arises where the writing forms the subject of an indictment or an action, and the guilt or innocence of the defendant depends upon the popular meaning of the language employed. Thus, the legislature, after much discussion,[7] has expressly determined[8] that,

[1] Berwick *v.* Horsfall, 1858, 27 L. J. C. P. 193.

[2] Furness *v.* Meek, 1862, 27 L. J. Ex. 34.

[3] Macbeath *v.* Haldimand, 1786, 1 T. R. 172; Smith *v.* Thompson, 1849, 18 L. J. C. P. 314. See Lyle *v.* Richards, 1867, L. R. 1 H. L. 222.

[4] Wilkinson *v.* Storey, 1839, 1 Jebb & Sy. 509. See Brook *v.* Hook, 1871, L. R. 6 Ex. 89.

[5] Bolckow *v.* Seymour, 1864, 17 C. B. (N.S.) 107.

[6] Berwick *v.* Horsfall, 1858, 27 L. J. C. P. 193.

[7] As to this celebrated dispute, in support of the claims of the judges, see R. *v.* Udall, 1590, 1 How. St. Tr. 1289; R. *v.* Woodfall, 1770, 5 Burr. 2661; R. *v.* Dean of St. Asaph, 1783, 21 How. St. Tr. 1033; and in support of the rights of the jury, R. *v.* Tutchin, 1704, 14 How. St. Tr. 1128; R. *v.* Owen, 1752, 18 How. St. Tr. 1223; R. *v.* Dean of St. Asaph, 1783, 21 How. St. Tr. 1033. As to the proceedings in the House of Lords on the passing of "The Libel Act" (32 G. 3, c. 60), see 22 How. St. Tr. 294, 297.

[8] 32 G. 3, c. 60 (commonly called "Fox's Libel Act"), declares and enacts (§ 1) that, on every trial of an

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§§ 42, 43. on a prosecution for *libel*, the question whether the particular publication is a libel or not, shall always be entirely for the jury. Even here the judge may, as a matter of advice to them, give his own opinion respecting the nature of the publication, though he is not in point of law bound to do so.[1] The statute here referred to is in strictness only applicable to criminal trials, but as it is a declaratory Act, its provisions have in practice been adopted in civil actions for libel, and it has now for a series of years been the course for the judge,—who still has to decide whether the words complained of are reasonably *capable* of bearing the defamatory meaning ascribed to them by the plaintiff[2]—to first give a legal definition of the offence, and then leave the jury to determine whether the writing complained of falls within that definition or not.[3] It is, indeed, not absolutely necessary that the judge should explain what constitutes a libel, but he may leave the whole question without reserve to the jury.[4] If, however, they find a verdict against the defendant, either on an indictment or an action, the court will arrest the judgment, where the writing on the face of it is not libellous.[5]

§ 43. On indictments for sending any threatening writing or letter under §§ 44 and 46 of the Larceny Act, 1861,[6] it is a question

indictment or information for a libel, "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." § 2 provides, that, "on every such trial, the court or judge, before whom such indictment or information shall be tried, *shall*,* according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant or defendants as in other criminal cases." § 3 provides that a jury may find a special verdict; and § 4 reserves to defendants a right to move in arrest of judgment.

[1] Per Parke, B., in Parmiter *v.* Coupland, 1840, 6 M. & W. 107.

[2] Hunt *v.* Goodlake, 1873, 43 L. J. C. P. 54; Sturt *v.* Blagg, 1847, 10 Q. B. 906.

[3] Parmiter *v.* Coupland, 1840, 6 M. & W. 107.

[4] Baylis *v.* Lawrence, 1841, 11 A. & E. 926.

[5] Hearne *v.* Stowell, 1840, 12 A. & E. 719; Goldstein *v.* Foss, 1827, 6 B. & C. 154; Parmiter *v.* Coupland, 1840, 6 M. & W. 107.

[6] 24 & 25 V. c. 96.

* It has been said that the word "shall" should here be interpreted as if the word "may" had been used. Baylis *v.* Lawrence, 1840, 11 A. & E. 926 (Littledale, J.).

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of fact for the jury whether the writing or letter coupled with the circumstances under which it was sent constituted a menace.[1] The only question for the judge is whether there is any evidence of such menace to be left to the jury.[2] On an indictment for obtaining goods by false pretences, the pretences alleged being contained in a letter from the prisoner, it is the duty of the judge to determine whether the document is reasonably capable of bearing the meaning attributed to it, and for the jury to say whether it in fact does so; there being, moreover, a further question, namely, whether or not the prosecutor parted with his goods on the faith of the letter being true, it is admissible to ask him what his opinion was as to the meaning of the letter when he received it.[3] On a question as to the construction of a writing written by defendant and alleged to be libellous, other libels by the defendant are admissible[4] both as to construction and to show malice.[5]

§ 44. In connection with the subject of libel, it should be mentioned that it is a question of law for the court whether a *communication* be *privileged* or not. If, indeed, the privilege claimed be of a character that it is on public grounds regarded as *absolute*,[6] the jury must first determine what the circumstances were under which the communication was made, and also whether such communication was made *bonâ fide*. They ought to find *bona fides* unless the evidence be sufficient to raise a probability that the communication was colourably made.[7] After they have found the facts and determined the question of *bona fides*, the judge must decide, as a question of law, whether the occasion of the publication was such as to rebut the inference of malice.[8] If, however, any doubt exist as to whether or not the defendant in

[1] R. *v.* Cooper, 1849, 3 Cox, C. C. 547; R. *v.* Braynell, 1850, 4 Cox, C. C. 404; R. *v.* Tomlinson, [1895] 1 Q. B. 706.

[2] R. *v.* Walton, 1863, L. & C. 288.

[3] R. *v.* King, [1897] 1 Q. B. 214, C. C. R.

[4] Bolton *v.* O'Brien, 1885, 16 L. R. Ir. 97.

[5] Barrett *v.* Long, 1851, 8 Ir. L. R. 331, H. L. Though the jury are usually cautioned not to give damages for them, the omission of such caution is not a misdirection. Darby *v.* Ouseley, 1856, 25 L. J. Ex. 227.

[6] As to such absolute privilege, see Dawkins *v.* Paulet, 1869, L. R. 5 Q. B. 94; and Dawkins *v.* Ld. Rokeby, 1873, L. R. 8 Q. B. 255.

[7] Taylor *v.* Hawkins, 1851, 16 Q. B. 308; Somerville *v.* Hawkins, 1851, 20 L. J. C. P. 131.

[8] Coxhead *v.* Richards, 1846, 2 C. B. 584; Stace *v.* Griffith, 1869, L. R. 2 P. C. 420.

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§§ 44, 45a.

some respects exceeded the limits of his privilege, and made comments, which may be evidence of *actual* malice, the opinion of the jury must be taken upon the effect of such evidence.[1]

§ 45. On an indictment for perjury the materiality of the matter in which the false swearing is proved is a question of law for the judge.[2]

§ 45A. All questions of mere fact are for the decision of a jury, unaided by any positive legal rules—it being the duty of the judge merely to take care that they are not misled by anything coming out in the evidence.[3] Questions of this description are as to permissive occupation;[4] the assent of an executor to a bequest;[5] the unsoundness of a horse;[6] the delivery of a document as an escrow, unless the question turn solely on the construction of writings;[7] the infringement of a patent,[8] where such infringement does not depend merely on the construction of the specification;[9] the novelty of a design, within the meaning of the Acts relating to copyright of design for articles of manufacture;[10] the existence of a nuisance, as caused by erecting a bridge or weir in a navigable stream;[11] the definition of the word "street,"[12] except in certain cases where the term has been employed in an Act of Parliament;[13] the seaworthiness of a ship;[14] the construction of a policy of

[1] Cooke *v.* Wildes, 1855, 24 L. J. Q. B. 367; and this is so even where a corporation is defendant (as to which, see post, § 981): Neville *v.* Fine Arts, &c. Co., [1895] 2 Q. B. 156.

[2] Russell on Crimes, 6th ed. v. i., p. 319; R. *v.* Courtenay, 1856, 7 Cox, C. C. 111; R. *v.* Gibbon, 1861, L. & C. 109; R. *v.* Baker, [1895] 1 Q. B. 797.

[3] Mackintosh *v.* Marshall, 1843, 12 L. J. Ex. 337.

[4] Lessee of Phayre *v.* Fahy, 1832, Hay. & Jon. 128 (Ir.); Jones *v.* Boland, 1840, 2 Jebb & Sy. 289 (Ir.); but see Whiteacre *v.* Symonds, 1808, 10 East, 13.

[5] Mason *v.* Farnell, 1844, 13 L. J. Ex. 142; even though "the question depends upon the careful and somewhat critical comparison of the terms of a deed with the other circumstances and facts of the case." Per Alderson, B., pronouncing the judgment of the court. See, also, Elliott *v.* Elliott, 1841, 11 L. J. Ex. 3.

[6] Baylis *v.* Lawrence, 1840, 11 A. & E. 926.

[7] Furness *v.* Meek, 1858, 27 L. J. Ex. 34, H. L. See ante, § 41, post, § 1834.

[8] De la Rue *v.* Dickenson, 1857, 7 E. & B. 738; Lister *v.* Leather, 1858, 8 E. & B. 1004.

[9] Seed *v.* Higgins, 1860, 30 L. J. Q. B. 314, H. L. See post, § 43.

[10] Harrison *v.* Taylor, 1860, 29 L. J. Ex. 3.

[11] R. *v.* Betts, 1850, 19 L. J. Q. B. 501; R. *v.* Russell, 1827, 6 B. & C. 566; R. *v.* Ward, 1836, 4 A. & E. 384.

[12] R. *v.* Fullford, 1861, 33 L. J. M. C. 122.

[13] Robinson *v.* Local Board of Barton, 1882; Maude *v.* Baildon Local Board, 1883, 10 Q. B. D. 394.

[14] Clifford *v.* Hunter, 1827, 3 C. & P. 16.

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insurance, shown by evidence to contain a latent ambiguity;[1] the materiality of facts not communicated in effecting an insurance;[2] the competency of a testator in a will cause, and his freedom from undue influence;[3] the cruelty of a husband as a ground for judicial separation;[4] the condonation of a conjugal offence;[5] whether there has been an acceptance of goods sufficient to satisfy the Sale of Goods Act;[6] whether a tender be absolute or conditional.[7] The court, however, in the last-named case, should be mindful to point out that a tender is not invalid in law as being conditional, if it merely implies that the debtor admits no more to be due, but that to make it bad it must go further, and imply that the creditor, if he takes the sum offered, will admit that his entire claim is satisfied.[8] The jury have also, in any question relating to the amount of interest payable on a foreign bill of exchange, to determine as facts, first, what rate of interest is usually paid at the respective places where the bill was drawn or indorsed or accepted, and next, whether the plaintiff has sustained any damage requiring the payment of interest at all; but the judge will decide as a pure question of law, whether the case is to be governed *lege loci contractûs*, or *lege loci solutionis*.[9]

§ 46. Among other matters of fact it is for a jury to decide whether articles supplied to an infant be *necessaries:* but, as to this, their decision is *subject to the control* of the judges,[10] who have laid down the following general rules of law: first, the question whether articles are necessaries or not does not, in any degree, depend upon what allowance the infant may have received from his father, and may have misapplied;[11] secondly, the articles

[1] Hordern *v.* Commercial Union, &c., 1887, 56 L. J. P. C. 78.

[2] Rawlings *v.* Desborough, 1840, 2 M. & Rob. 328.

[3] Purdon *v.* Ld. Longford, 1877, 11 Ir. R. C. L. 267.

[4] Tomkins *v.* Tomkins, 1859, 1 Sw. & Tr. 168.

[5] Peacock *v.* Peacock, 1859, 27 L. J. Mat. 71.

[6] Lillywhite *v.* Devereux, 1846, 15 M. & W. 291; Alderson, B., recognising Edan *v.* Dudfield, 1841, 1 Q. B. 302; Clark *v.* Wright, 1860, 11 Ir. C. L. R. 402; decided under the Statute of Frauds.

[7] Ekstein *v.* Reynolds, 1837, 7 A. & E. 80; Marsden *v.* Goode, 1845, 2 Car. & K. 133.

[8] Bowen *v.* Owen, 1847, 17 L. J. Q. B. 5; Bull *v.* Parker, 1843, 12 L. J. Q. B. 93; Henwood *v.* Oliver, 1841, 1 Q. B. 409.

[9] Gibbs *v.* Fremont, 1853, 22 L. J. Ex. 302. See further on this subject, post, § 47.

[10] Harrison *v.* Fane, 1840, 1 M. & Gr. 550; Ryder *v.* Wombwell, 1868, L. R. 4 Ex. 32.

[11] Burghart *v.* Hall, 1839, 8 L. J. Ex. 235; Peters *v.* Fleming, 1840, 9 L. J. Ex. 81. But see Barnes *v.*

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§§ **46, 47.** must be *really useful*, and therefore merely ornamental jewellery,[1] or luxurious confectionery,[2] cannot be necessaries; and, thirdly, articles, even if useful, must be such as would be necessary and suitable to the degree and station in life of the infant.[3] The judge determines whether the articles are *capable* of being necessaries, regard being had to the position of the defendant; and if he decide this in the affirmative, the jury say whether, under the circumstances, they actually were necessaries or not.[4] Funeral expenses incurred on her husband's death by an infant widow;[5] legal expenses incurred by an infant bride on marriage,[6] and a gold watch and chain for an undergraduate,[7] and even a racing bicycle to an apprentice earning twenty-one shillings a week,[8] are all capable of being "necessaries." But a pair of jewelled solitaires and a silver-gilt goblet cannot be "necessaries."[1] And in a case where the jury, in opposition to the opinion of the judge, found that the hiring of horses and gigs were "necessaries" for an Oxford undergraduate, who was the younger son of a man of fortune, but kept a horse of his own, the court set aside the verdict as perverse, and granted a new trial;[9] the same course was pursued, where an Irish jury had found that a hunter was "necessary" for a mere boy.[10]

§ 47. Questions as to the meaning of particular expressions have already been seen to be in all criminal cases—and this even when they are in writing—entirely for the jury.[11] Speaking generally, it may be said that the meaning of expressions is in

Toye, 1884, 13 Q. B. D. 410, where it was held that, on a question of necessaries, an infant might prove that at the date of the sale he was sufficiently supplied with other similar goods.

[1] Ryder *v.* Wombwell, 1868, L. R. 4 Ex. 32, supra.

[2] Brooker *v.* Scott, 1843, 11 M. & W. 67; Wharton *v.* Mackenzie, 1844, 13 L. J. Q. B. 130; and Cripps *v.* Hills, 1844, 5 Q. B. 606.

[3] Peters *v.* Fleming, 1840, 9 L. J. Ex. 81.

[4] See Skrine *v.* Gordon, 5 Ir. R. 9 C. L. 479, infra, and Cripps *v.* Hills, 1844, 13 L. J. Q. B. 130, supra.

[5] Chapple *v.* Cooper, 1844, 13 L. J. Ex. 286.

[6] Helps *v.* Clayton, 1864, 34 L. J. C. P. 1.

[7] Peters *v.* Fleming, 1840, 9 L. J. Ex. 81.

[8] Clyde Cycle Co. *v.* Hargreaves, 1898, 78 L. T. 298 (D.).

[9] Harrison *v.* Fane, 1840, 1 M. & Gr. 550.

[10] Skrine *v.* Gordon, 1875, Ir. R. 9 C. L. 479; so in Wharton *v.* Mackenzie, 1844, 13 L. J. Q. B. 130, and Cripps *v.* Hills, 1844, 13 L. J. Q. B. 130, where juries decided that wine parties and suppers were necessaries for undergraduates.

[11] Ante, § 42.

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§ 47.

most cases to be determined by a jury. The power of a jury to interpret expressions is not confined merely to such as are employed in contracts, or have a peculiar commercial meaning. It extends to all phrases, capable of being used in a technical sense, which do not require any knowledge of the law to explain them. Accordingly, the courts have more than once refused to entertain the question, whether an excavation is or is not a mine,[1] and as such not rateable to the relief of the poor, and have left the Sessions to apply to the question, as one of fact, the information they possess, and their knowledge of the English language,[2] declining to lay down any legal principle, except that the method of working is to be considered, and not the chemical or geological character of the produce.[3] It also is exclusively for a jury to say whether what is proved to have taken place is or is not "a representation" of a dramatic work, so as to subject the person representing it to penalties under the Act of 3 & 4 W. 4, c. 15 ("The Dramatic Copyright Act, 1833").[4] If, however, a word of doubtful import be used in an Act of Parliament, its general meaning ought to be explained to the jury by the judge; and accordingly where, on the trial of an issue whether a railway was passing through "a town," within the meaning of the Railway Clauses Consolidation Act, the judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense, the omission to give them any further instruction was held to constitute a misdirection, and a new trial was granted.[5] But the inspection of a record is a matter within the peculiar province of the court; and a jury will not be allowed to examine a record,

[1] Any question as to whether a mine is a mine within the meaning of the Mining Acts "shall be referred to a Secretary of State, whose decision thereon shall be final." 50 & 51 V. c. 58, § 71; and 35 & 36 V. c. 77, § 39.

[2] R. *v.* Sedgeley, 1831, 3 B. & Ad. 65; R. *v.* Brettell, 1832, 1 L. J. M. C. 46; R. *v.* Dunsford, 1835, 2 Ad. & E. 568. "The Court of Quarter Sessions are judges of law and fact. The appeal to the Queen's Bench is confined to questions of law. The distinction, therefore, between the respective provinces of the two courts is so far analogous to the distinction under discussion as to justify the drawing of illustrations from cases of appeal."

[3] See Darvill *v.* Roper, 1855, 24 L. J. Ch. 779; Bell *v.* Wilson, 1866, 35 L. J. Ch. 337; Dow. Duch. of Cleveland *v.* Meyrick, 1868, 37 L. J. Ch. 125. But see Jones *v.* Cwmorthen Slate Co., 1879, 5 Ex. D. 93. See, also, Midl. Ry. Co. *v.* Haunchwood Brick and Tile Co., 1882, 20 Ch. D. 552.

[4] Planche *v.* Braham, 1837, 8 C. & P. 68.

[5] Elliott *v.* South Devon Ry. Co., 1848, 17 L. J. Ex. 262.

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§§ 47—49.

for the purpose of giving their opinion as to what word has been written above an erasure.[1]

§ 48. Questions as to whether a *foreign* law, &c. exists or not are, as we have already seen,[2] entirely matters to be *found as facts* by a jury. Foreign[3] laws, usages and customs cannot be judicially noticed, but must be proved as facts in each particular case,[4] and found by the jury. In such cases, the abstract *meaning* as well as the *existence* of the law must, in general, be determined by the jury on the testimony of the skilled witnesses.[5] It is, however, the duty of the court to decide, first, as to the competent knowledge of the witnesses called;[6] next, as to the admissibility of the documents by which they seek to refresh their memory; and lastly,[7] as to the special applicability of the law, when proved, to the particular matter in controversy.[8] Even where the admissibility or inadmissibility of certain evidence depends on its *existence or interpretation*, proof of a foreign law should exclusively be addressed to the court, just as in other cases where a question respecting the admissibility of evidence rests upon disputed facts.[9] Perhaps, indeed, as the object of the proof of foreign law is to enable the court to instruct the jury respecting its bearing on the case in hand, it will always be advisable for the judge to assist the jury in ascertaining what the law really is.[10]

§ 49. Before leaving the subject of foreign law, it must be pointed out that the rules of evidence adopted in one country,—whether established by the practice of its courts, or enacted by its legislature,—will not regulate the proceedings of courts in another country, when transactions in the first-named country

[1] R. *v.* Hucks, 1816, 1 Stark. 523.

[2] Ante, § 5.

[3] As to *colonial laws*, see ante, § 9.

[4] Although a point of foreign law may have been proved and acted upon in one court, another court will not rely upon the report of such a case, but will require fresh proof of the law, as a matter of fact, on each particular occasion: M'Cormick *v.* Garnett, 1854, 23 L. J. Ch. 717.

[5] R. *v.* Picton, 1806, 30 How. St. Tr. 536.

[6] Bristow *v.* Sequeville, 1850, 19 L. J. Ex. 289. The whole of this subject will be discussed, post, §§ 1423—1425.

[7] See Sussex Peer. case, 1844, 11 Cl. & Fin. 114; Ld. Nelson *v.* Ld. Bridport, 1846, 8 Beav. 547.

[8] Story, Confl. (Am.), § 638.

[9] Trasher *v.* Everhart, 1831, 3 Gill. & J. 234 (Am.); Story, Confl. (Am.), § 638, n. 3, ante, § 23.

[10] See Story, Confl. (Am.), § 638; Mostyn *v.* Fabrigas, 1774, 1 Cowp. 174; Di Sora *v.* Phillips, 1863, 33 L. J. Ch. 129.

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§ 49.

become the subject of investigation in the latter.[1] The *lex fori* governs every court upon all questions of evidence. Such questions as whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not, must be determined, not *lege loci contractûs*, but by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it.[2] Thus, where (before "the Evidence Amendment Act of 1851"[3]) the assignees of an English bankrupt sued in Calcutta, the bankruptcy and the assignment could not be proved in the Calcutta court by producing copies of the proceedings in the Bankruptcy Court, purporting to bear the seal of that court, and to be signed by the Clerk of Enrolments, for such evidence, although sufficient in English courts of justice was not then admissible in India.[4] Again, although by Scotch law, all instruments prepared and witnessed according to the provisions of the Scotch Act of 1681 are probative writs, and may be given in evidence in a Scotch court without any proof, in an English court, the mere production of such a Scotch instrument would not suffice, but it would be necessary to call one or other of the attesting witnesses.[5] A copy of a charter-party which has been verified in accordance with the law of the place where it was entered into, cannot on that account be received in an English court, but is inadmissible here.[6] Several other cases might be cited to the same effect;[7] and in all, the distinction is recognised between *the cause of action*, which must be judged of according to the law of the country where it originated, and the *mode of proceeding*, including of course the rules of evidence, which must be adopted as it happens to exist in the country where the action is brought.[8]

[1] Clark *v.* Mullick, 1840, 3 Moo. P. C. 279, infra.
[2] Bain *v.* Whitehaven, &c. Junc. Ry. Co., 1850, 3 H. L. Cas. 19, H. L.
[3] 14 & 15 V. c. 99, §§ 11 and 19.
[4] Clark *v.* Mullick, 1840, 3 Moo. P. C. 279.
[5] Yates *v.* Thomson, 1835, 3 Cl. & Fin. 577.
[6] Brown *v.* Thornton, 1837, 6 L. J. K. B. 82.
[7] Trimbey *v.* Vignier, 1834, 1 Bing. N. C. 151; Huber *v.* Steiner, 1835, 2 Scott, 304; British Linen Co. *v.* Drummond, 1830, 10 B. & C. 903; Appleton *v.* Ld. Braybrook, 1816, 6 M. & S. 34; Black *v.* Braybrook, 1816, 2 Stark. 7; Don *v.* Lippmann, 1837, 5 Cl. & Fin. 1; Leroux *v.* Brown, 1852, 22 L. J. C. P. 1; Finlay *v.* Finlay, 1862, 31 L. J. P. & M. 149.
[8] Mostyn *v.* Fabrigas, 1774, 1 Cowp. 174. See, also, Story, Confl. (Am.), §§ 556 et seq. and 629—636.

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§ 49a. § 49A. English courts-martial held abroad are expressly excepted from the general rule that the *lex fori* governs the laws of evidence. For the Army Act, 1881,[1] enacts, first, that "a court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any legislature whatsoever, other than the Parliament of the United Kingdom;" and next that "the rules of evidence to be adopted in proceedings before courts-martial shall be the same as those which are followed in civil courts in England and no person shall be required to answer any question or to produce any documents, which he could not be required to answer or produce in similar proceedings before a civil court."

[1] 44 & 45 V. c. 58, §§ 127 and 128.

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CHAPTER IV.

THE GROUNDS OF BELIEF.

§ 50. § 50.[1] We proceed now to a brief consideration of the *General Nature and Principles of Evidence.* No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all which men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge acquired by an individual through his own perception and reflection is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge, having been acquired through the perception of others.[2] It is not easy to conceive that the Supreme Being, whose wisdom is so conspicuous in all His works, constituted man to believe only upon his own personal experience; since, in that case, the world could neither be governed nor improved; and society must remain in the state in which it was left by the first generation of men. On the contrary, during the period of childhood we believe implicity almost all that is told us; and we thus are furnished with information which we could not obtain for ourselves, but which is necessary at the time for our present protection, or as the means of future improvement. This disposition to confide in the veracity of others, and to believe what they say, may be termed *instinctive.* At an early period, however, we begin to find that of the things told to us some are not true; and thus our implicit reliance on the testimony of others is weakened; first, in regard to particular things, in which we have been deceived; then, in regard to persons, whose falsehoods we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of statements

[1] Gr. Ev. § 7, nearly verbatim.

[2] Abercr. on Intell. Pow., Part 2, p. 42.

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§ 50. made to us, and learn by experience the necessity of testing them by certain rules.[1] "Confidence," exclaimed Lord Chatham, on a memorable occasion, "is a plant of slow growth in an aged bosom;" and indeed, it may be generally observed, that, as our ability to obtain knowledge by other means increases, our instinctive and indiscriminate reliance on testimony diminishes, by yielding to a more rational belief.[2] Still, in every period of life,

[1] Abercr. on Intell. Pow., Part 2, § 3, p. 73.

[2] Gr. Ev. § 7, n. verbatim. See also Gamb. Guide, 87; M'Kinnon, Phil. of Ev. 40. Dr. Reid, in his Inquiry into the Human Mind, c. 6, § 24, pp. 196, 197 of his collected Works, observes:—"The wise and beneficent Author of Nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our nature two principles, that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature; and is never practised, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end, which he cannot otherwise attain. . . . Another original principle, implanted in us by the Supreme Being, is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counterpart to the former: and as that may be called the principle of veracity, we shall, for want of a proper name, call this the principle of credulity. It is unlimited in children until they meet with instances of deceit and falsehood; and it contains a very considerable degree of strength through life. If nature had left the mind of the speaker in equilibrio, without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak truth, until reason was so far ripened, as to suggest the imprudence of lying, or conscience, as to suggest its immorality. And if nature had left the mind of the hearer in equilibrio, without any inclination to the side of belief more than to that of disbelief, we should take no man's word, until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false: but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that, in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale. If it was not so, no proposition, that is uttered in discourse would be believed, until it was examined and tried by reason: and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life, and of the manners and characters of men, would be in the next degree incredulous; and the most credulous men would be those of greatest experience, and of

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and in every state of intellectual culture, man is instinctively more prone to believe than to disbelieve the testimony of others, and this disposition towards credulity may be regarded as a fundamental principle of our moral nature, implanted in us by the Almighty for the wisest and most beneficent purposes. As such it constitutes the general basis upon which all evidence may be said to rest.

§ 51.[1] Subordinate to this paramount and original principle, evidence rests upon our *faith in human testimony, as sanctioned by experience;* that is, upon the generally experienced truth of the statements on oath of men of integrity, having capacity and opportunity for observation, and without apparent influence from passion or interest to pervert the truth. This belief is strengthened by our knowledge of the narrator's reputation for veracity and intelligence, by the absence of conflicting testimony, and by the presence of that which is corroborating and cumulative.[2]

§ 52. In the hasty progress of a trial at Nisi Prius, it is difficult, and sometimes impossible, to ascertain, with anything like certainty, what characters the witnesses respectively deserve for honesty and intelligence, and how far they are actuated by interested, malignant, or other impropor motives. A rigid cross-examination, skilfully applied,[3] will, however, often throw much light upon these subjects; while a careful attention to the demeanour of the witness is always a good guide. While

the deepest penetration; because, in many cases, they would be able to find good reasons for believing testimony, which the weak and the ignorant could not discover. In a word, if credulity were the effect of reasoning and experience, it must grow up and gather strength, in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first."

[1] Gr. Ev. § 10, nearly verbatim.

[2] Archbishop Whately, in his jeu d'esprit, "Historic Doubts relative to Napoleon Buonaparte," clearly states the main tests of human veracity. He says: "I suppose it will not be denied that the three following are among the most important points to be ascertained, in deciding on the credibility of witnesses: first, whether they have the means of gaining correct information; secondly, whether they have any interest in concealing truth, or propagating falsehood; and, thirdly, whether they agree in their testimony." P. 14, 6th ed.

[3] In the Tichborne trial of 1871, Mr. Hawkins' cross-examination of Mr. Baigent should be carefully studied, as being the best modern example of forensic ability in that direction.

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§§ 52, 53. simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct.[1] We have, too, more or less conclusive indications of insincerity or falsehood when we find a witness over-zealous on behalf of his party; exaggerating circumstances; assuming an air of bluster and defiance;[2] answering without waiting to hear the question; telling his story glibly and with extraordinary accuracy in language obviously not his own; forgetting facts where he would be open to contradiction; minutely remembering others, which he knows cannot be disputed;[3] reluctant in giving adverse testimony; replying evasively or flippantly;[4] pretending not to hear the question, for the purpose of gaining time to consider the effect of his answer; affecting indifference; or often vowing to God[5] and protesting his honesty.[6] In the testimony of witnesses of truth there is, on the other hand, a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection.[7]

§ 53. Besides these tests of truth, which are obviously of value in fixing what amount of credit is due to each *individual* witness, certain general rules must be borne in mind, as bearing upon the relative merits of particular *classes of witnesses*. It has been said that "a propensity to lying has been always, more or less, a peculiar feature in the character of an enslaved people,—accustomed to oppression of every kind, and to be called upon to render strict account of every trifle done, not according to the rules of justice, but as the caprice of their masters may suggest;—it is little to be

[1] Channing, Ev. of Christ. 3rd vol. of Works, 356.

[2] "Asseveration blustering in your face
Makes contradiction such a hopeless case."
COWPER, *Conversation.*

[3] "For, when we risk no contradiction,
It prompts the tongue to deal in fiction."
GAY'S *Fables*, Part. i., Fable x.

[4] "All persons who have been accustomed to see witnesses in a court of justice know, that those who are stating falsehoods are extremely apt to give flippant and impertinent answers." Per Mr. Brougham on the Queen's trial, 1820.

[5] "And even when sober truth prevails throughout,
They swear it, till affirmance breeds a doubt."
COWPER, *Conversation.*

[6] 1 St. Ev. 547.

[7] Greenl. on Test. of Evang. § 40.

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wondered at if a lie is often resorted to as a supposed refuge from punishment, and that thus an habitual disregard is engendered."[1] This passage accounts in some measure for the lamentable neglect of truth evinced by most Oriental nations, by Russians, and by some of the Irish peasantry.

§ 54. Again, as exaggeration chiefly springs from an innate love of the marvellous,[2] and is most remarkable in the softer sex,[3] a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This is the more necessary, in consequence of the extensive and dangerous field of falsehood opened up by mere exaggeration; for, as truth is made the groundwork of the picture, and fiction lends but light and shade, to detect the lurking falsehood often requires much patience and acuteness.[4] In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent.[5] If due allowance be made for this femineweakness of a proneness to exaggerate, the testimony of women is at least deserving of equal credit to that of men. Indeed, in some respects they are superior witnesses; for first, they are, in general, closer observers than men; next, their

[1] Bp. of Tasmania's Lect. on Christ. Catechism, 519.

[2] Bp. of Tasmania's Lecture on Christ. Catechism, 522.

[3] The *woman* of Samaria, for instance, when told by our Saviour that she had had five husbands, went into the city, saying, "Come, see a man, which told me *all things that ever I did*." 4th ch. of St. John, v. 29.

[4] Bp. of Tasmania's Lect. on Christ. Catechism, 522. The difficulty of detecting falsehood engrafted on truth has been noticed by Tennyson, in the "Grandmother":—

"and the parson . . . said likewise,
That a lie which is half a truth is ever the blackest of lies,
That a lie which is all a lie may be met and fought with outright,
But a lie which is part a truth is a harder matter to fight."

Mr. Brougham, in the Queen's trial, 1820, said: "If an individual were to invent a story entirely,—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, he may raise a tale which, with a good deal of drilling, may put an honest man's life, or an illustrious Princess' reputation, in jeopardy." 1 Ld. Br. Sp. 147. And, again: "The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much, or to come too directly to the point; but to lay the foundation in existing facts and real circumstances,—to knit the false with the true,—to interlace reality with fiction,—to build the fanciful fabric upon that which exists in nature,—and to escape detection by taking most especial care, as they have done here, never to have two witnesses to the same facts, and also to make the facts as moderate, and as little offensive, as possible." 1 Ld. Br. Sp. 215.

[5] Bp. of Tasmania's Lect. on Christ. Catechism, 522.

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§§ 54—56.

memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected, if rather lengthy, narration.[1]

§ 55. Sir William Blackstone apparently thought,[2] that less credit was due to the testimony of a *child* than to that of an adult; but reason and experience scarcely warrant this opinion. In childhood, observation and memory are usually more active than in after life, while the motives for falsehood are less numerous and powerful. The inexperience and artlessness accompanying tender years usually render a child incapable of sustaining consistent perjury, while they operate powerfully in preventing his true testimony from being shaken. A child comprehending the drift of the questions put in cross-examination has no course but to answer them according to the fact. Thus, if he speak falsely, he is almost inevitably detected; but if he be the witness of truth, he avoids even that suspicion of dishonesty, which sometimes attaches to older witnesses, who, though substantially telling the truth, throw discredit on their testimony, by a too anxious desire to reconcile every apparent inconsistency.

§ 56. The testimony of foreigners and of others, who are brought from a distance to the place of trial, requires to be scrutinised with more than common caution. Such persons speak before a tribunal which ordinarily knows no more of them than they care for it, whose threat they have no reason to fear, and whose good opinion they utterly disregard. Consequently they are obviously far less likely to be influenced by the dread of having their falsehoods exposed than witnesses living on the spot.[3] Such witnesses, even if detected of perjury, have little to fear from loss of character, and are in no real danger of punishment. A dishonest foreigner, who has attained a tolerable knowledge of our language, may, too, conceal it, and by seeking the assistance of an interpreter, obtain an opportunity of preparing with caution his answer to any inconvenient question

[1] Take, for instance, the Letters of Madame de Sévigné, or Lady Mary Wortley Montagu. The only letters written by men which at all equal them are those of the effeminate Ld. Orford.

[2] 4 Bl. Com. 216.

[3] Per Mr. Brougham on the Queen's trial, 1820. 1 Ld. Br. Sp. 126. See id. p. 241.

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during the time that the interpreter is furnishing him with a needless translation.[1]

§ 57. The testimony against a prisoner of *policemen, constables*, and others employed in the suppression and detection of crime, should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal and habitual contact with bad men and women almost necessarily leads them to ascribe all actions to the worst motives, and to give a colouring of guilt to facts and conversations, which, in themselves are consistent with perfect rectitude.[2] The creed of the police is naturally apt to be that "all men are guilty, till they are proved to be innocent."

§ 58. The testimony of *skilled witnesses* is perhaps that which deserves least credit with a jury. These usually speak to *opinions* and not to facts; and it is often really surprising to see the facility and extent to which views can be made to coincide with wishes or interests. Skilled witnesses do not, indeed, wilfully misrepresent what they think: but their judgments have often become so warped by regarding the subject from only one point of view, that they are, in truth, not capable of forming an independent opinion even when they would conscientiously desire to do so. Being zealous partisans, their belief becomes synonymous with the Apostle's[3] definition of Faith, "the substance of things *hoped for*, the evidence of things *not* seen." Lord Campbell once said, "Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."[4]

§ 59. Coincidences in the testimony of independent witnesses afford a *third* ground for the credibility of evidence. Such coincidences, when numerous, and presenting themselves as undesigned, or incidental, necessarily produce a prodigious effect in enforcing belief; because, if the witnesses had concerted a plot, the coincidencies would almost inevitably have been converted by cross-examination into contradictions;[5] while, if the supposition of

[1] Id. 168. See R. *v.* Burke, 1859, 8 Cox, C. C. 44 (Ir.), cited post, § 1444.

[2] See post, § 68.

[3] Ep. to the Hebrews, c. xi., v. 1.

[4] Tracy Peer., 1843, 10 Cl. & Fin. 191. See post, § 68.

[5] Mr. Brougham said on the Queen's trial:—"Why were there never two witnesses to the same fact?

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§§ **59, 60.** collusion, or that some deception has been practised on the witnesses, be excluded, then coincidences and harmony in the evidence of several persons can be explained upon no other hypothesis than that their individual statements are true. Each witness taken singly may be notorious for lying; but the chances against their all agreeing by accident in the same lie may be so great as to render the agreement morally impossible.[1] It has been remarked that "in a number of concurrent testimonies, where there has been no previous concert, there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses; a probability which would remain, even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance, is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no cause but the reality of the fact."[2]

§ 60. Lord Mansfield gave expression to the truth of this principle when he once observed, "It is objected that the books [Keble's and Freeman's Reports] are of no authority; but if both the reporters were the worst that ever reported, if *substantially* they report a case in the same way, it is demonstration of the truth of what they report, or they could not agree."[3] Dr. Paley, in his Evidences of Christianity, says that "the usual character of human testimony is *substantial truth under circumstantial variety*. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These

Because it is dangerous; because, when you are making a plot, you should have one witness to a fact, and another to a confirmation; have some things true, which unimpeachable evidence can prove; other things fabricated, without which the true would be of no avail,—but avoid calling two witnesses to the same thing at the same time, because the cross-examination is extremely likely to make them contradict each other." 1 Ld. Br. Sp. 215, 1820.

[1] Aber. on Intell. Pow., Part 2, § 3, p. 91.

[2] Campbell's Philos. of Rhetoric, ch. v. b. 1, par. 3, p. 125; Whately's Rhetoric, Part 1, ch. 2, § 4, pp. 58, 59.

[3] R. *v.* Genge, 1774, 1 Cowp. 16. The word "substantially" here used is highly important, with a view to the question of collusion, since it is scarcely possible that several independent witnesses should tell precisely the same tale, without any variation.

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inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud."[1] These last observations apply with almost overwhelming force when the facts deposed to consist of conversations or of a series of trifling and unimportant events, and the testimony is given after the lapse of a considerable interval of time.[2] §§ 60, 61.

§ 61.[3] *Fourthly*, in receiving the knowledge of facts from the testimony of others, men are much influenced by their *accordance with facts previously known or believed;* and this constitutes what is termed their *probability*. Statements, thus probable, are received upon evidence much less cogent than is required for the belief of those which do not accord with previous knowledge; but while such statements are more readily received, and justly relied upon, care should be taken lest all others be unduly distrusted. While unbounded credulity is the attribute of weak minds,—which quo magis nesciunt, eo magis admirantur,—indiscriminate scepticism belongs only to those who, affecting to make their own knowledge and observation the exclusive standard of probability, forget that they are liable to be misled even by their own senses.[4] Such persons, therefore, if they intend to sustain a truly consistent character, should act like Molière's Docteur, in "Le Mariage Forcé," who, in answer to Sganarelle's statement that he had come to see him, replied, "Seigneur Sganarelle, changez, s'il vous plait, cette façon de parler. Notre philosophie ordonne de ne point énoncer de proposition décisive, de parler de tout avec incertitude, de suspendre toujours son jugement; et par cette raison vous ne pouvez pas dire, je suis venu, mais, *il me semble* que je suis venu."[5] Even sceptical philosophers, true to the nature of man, but inconsistently with their avowed principles, receive a large portion of their knowledge upon testimony which has been

[1] Part 3, ch. 1, p. 158.
[2] See further on this interesting subject Greenl. on Test. of Evang. §§ 34—36.
[3] Gr. Ev. § 8, in great part.
[4] Abercr. on Intell. Pow., Part 2, § 3, p. 74. Channing, on Ev. of Revealed Relig., 3rd vol. of Works, p. 116, observes—"All my senses have sometimes given false reports."
[5] Scène 8.

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§§ **61, 62.** derived, not from their own experience, but from that of other men; and they will even do this about matters which are at variance with their own personal observation. Thus they receive with confidence the testimony of the historian in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts which, upon the narrow basis of their own "firm and unalterable experience," which is so much relied upon by Hume, they ought to reject, as wholly unworthy of belief.[1]

§ 62. The sceptical philosopher is not the only person, however, who is reluctant to lend faith to a narrative of facts, which do not strictly accord with preconceived opinions that are mistaken for knowledge. Persons of a similar stamp of mind to his are abundant in all ranks and conditions. Thus, the King of Siam rejected the testimony of the Dutch ambassador, that, in his country, water was sometimes congealed into a solid mass; for it was utterly repugnant to his own experience;[2] the stories of the Abyssinian traveller Bruce were long considered mere fictions; and in 1825, the evidence of George Stephenson, before a Parliamentary committee, was much impaired by his venturing an opinion, that steam-carriages might possibly travel on railroads twelve miles an hour.[3] With his finite knowledge, man should, in truth, on the one hand, be slow to reject a narrative as incredible, merely because it is beyond, or even contrary to, his own very limited experience. On the other hand, scientific knowledge is not confined within the narrow limits of *ascertained* facts, but enlarges the understanding so as to prepare it for the further reception of truth, and sets it free from many of the prejudices which influence men, whose minds are limited by merely the narrow field of actual experience. For example, Archimedes, deeply imbued as he was with science, might well have believed an account of the invention and wonderful powers of the steam-engine, which unscientific Englishmen of the last century would have rejected as incredible and absurd.[4]

[1] Abercr. on Intell. Pow., Part 2, § 3, pp. 79, 80.
[2] Id. p. 75.
[3] Life of George Stephenson, by Samuel Smiles, 1857, ch. 19.
[4] Abercr. on Intell. Pow., Part 2,

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§ 63.[1] A *fifth* basis of evidence is the known and experienced *connexion* subsisting *between collateral facts* or circumstances satisfactorily proved, *and facts* and circumstances such as those which are *in controversy*. This is merely the legal application of a process familiar in natural philosophy, namely, that of proving the truth of a hypothesis by showing its coincidence with existing phenomena. Such connexions and coincidences may be either physical or moral; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of man.[2] Their degree of force depends on their sufficiency to exclude every other hypothesis but the one under consideration, and will be considered hereafter.[3] Meanwhile a good illustration of the legal application of the principle is afforded by the doctrine of law by which the possession of goods recently stolen, accompanied with personal proximity in point of time and place to them by the party charged, accompanied by inability on his part to show how he came by them, naturally, though not necessarily,[4] excludes every hypothesis but that of his guilt, although the possession of the same goods at another time and place would warrant no such conclusion, since it leaves room for the hypothesis of the goods having been lawfully purchased in the course of trade. Another illustration of the same principle is afforded by the legal rule of construction "*noscitur a sociis*," which implies that the meaning of words in a written instrument is ascertained by the context.

§ 64.[5] In considering this subject, it must always be borne in mind, that in the actual occurrences of human life nothing is inconsistent. Every event, which actually transpires, has its

§ 3, pp. 75, 76. So Voltaire shrewdly observes:—"Là où le vulgaire rit, le philosophe admire; et il rit où le vulgaire ouvre de grands yeux stupides d'étonnement." Vol. 42, p. 142.

[1] Gr. Ev. § 11, verbatim, except the notes.

[2] For an amusing example of a fact proved by a long chain of circumstantial evidence, see Voltaire's Zadig, ch. 3.

[3] Post, §§ 64—69.

[4] For Joseph's cup was found in Benjamin's sack, Gen. c. 44, v. 1—17. The story of the Hunchback, in the Arabian Nights, and that of the Baked Head, in Mr. Morier's Hajji Baba, both turn on an erroneous presumption of guilt arising from recent possession. See, too, Smollett's Roderick Random, ch. xxi.

[5] Gr. Ev. § 12, in great part.

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§§ **64, 65.** appropriate relation and place in the vast complicati circumstances of which the affairs of men consist; it ow origin to those which have preceded it; it is intimately conn with many others which occur at the same time and place often with those of remote regions; and, in its turn, it birth to a thousand others which succeed.[1] In all this syst interdependence perfect harmony prevails; so that a ma hardly invent a story, which, if closely compared with al actual contemporaneous and successive occurrences, may n shown to be false. From these causes, minds enlarged by and matured experience, and close observation of the co and affairs of men, may, with a rapidity and certainty appr ing to intuition, perceive the elements of truth or falseho the face itself of the narrator, without any regard to the n tive. Thus, an experienced judge may instantly discove falsehood of a witness, whose story an inexperienced jury n be inclined to believe. But though the mind, in these c seems to have acquired a new power, it is properly to be ref only to experience and observation.

§ 65.[2] In trials of fact, it will generally be found that the *fa probandum* is either directly attested by those who speak their own actual and personal knowledge of its existence, or be inferred from other facts, satisfactorily proved. In the fo case, the proof rests upon the *second*, *third*, and *fourth* groun belief before mentioned; that is, it depends, partly, upon in human testimony, as sanctioned by experience;—which will be increased or diminished in proportion to the appa honesty and intelligence of the witnesses, and their opportun for observation;—partly, upon the exercise of reason on consistency of the narratives given by different witnesses;— here the value of the testimony will vary, according to number of the deponents, and the apparent absence or pres of collusion;—and partly upon the conformity of the testim with experience. In the latter case, however, namely, when fact in dispute is to be inferred from other facts satisfacto established, the proof rests upon the grounds before mentio

[1] 1 St. Ev. 560; 3 Channing's Works, 133, 340.

[2] Gr. Ev. § 13, in great part.

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with the addition of the connexion shown by knowledge and experience to usually exist between collateral facts such as those which have been proved, and facts such as those which are in controversy; which connexion has already been pointed out to constitute the *fifth* basis of evidence before stated. In both the two cases which have been above supposed, the facts proved are directly attested. In the former one, the proof applies immediately to the *factum probandum*, without any intervening process, and is therefore called *direct* or *positive* testimony. In the latter case, the proof applies immediately to collateral facts, supposed to have a connexion, near or remote, with the fact in controversy, and is termed *circumstantial;* and sometimes (although not with entire accuracy) *presumptive*. For example, if a witness testifies that he saw A. inflict a mortal wound on B., of which B. instantly died, this is a case of direct evidence. If, however, a witness only testifies that a deceased person was shot with a pistol, and it is proved from other sources that the wadding was found to be part of a letter addressed to the prisoner, the residue of which was discovered in his pocket, the facts themselves are directly attested; but the evidence which they afford is termed *circumstantial*. From such facts, if unexplained by the prisoner, the jury may, or may not, *deduce*, or *infer*, or *presume* his guilt, according as they are satisfied, or not, of the natural connexion between similar facts and the guilt of the person thus connected with them. In both cases the veracity of the witness is presumed, in the absence of proof to the contrary; but in the latter case there is an additional presumption or inference, founded on the known usual connexion between the facts proved, and the guilt of the party implicated. This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence afforded by circumstances to be sometimes termed presumptive evidence; though, in truth, the mental operation is similar in both cases. §§ **65, 66.**

§ 66. Much has been said and written respecting the comparative value of direct and circumstantial evidence; but one argument urged in favour of circumstantial evidence is palpably erroneous. "Witnesses may lie, but circumstances cannot,"[1]

[1] Annesley *v.* Ld. Anglesea, (Ir.) 1743, 17 How. St. Tr. 1430; R. *v.* Blandy, 1752, 18 How. St. Tr. 1187.

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§ 66. has been more than once repeated from the bench, and almost received as a judicial axiom. Yet no proposition more false or dangerous. If "circumstances" mean—an can have no other meaning—those facts which lead to the ence of the fact in issue, they not only can, but constan lie—in the sense that the conclusion deduced from them is For example, when the viper fastened on St. Paul's ha Melita, the barbarians said "*No doubt* this man is a murd but when they saw that no harm came to him, "they ch their minds, and said that he was a god,"[1] and both concl were alike false. Again, in Macbeth, Lenox, Macduff, a other chieftains are described as erroneously assuming that the grooms had murdered the King, because "their and faces were all badged with blood, so were their da which unwiped we found upon their pillows:"[2] and nex "they were suborned" by the King's two sons, who had " away and fled."[3] In truth, the only "circumstances whic not lie" are those which *necessarily* lead to a certain concl Who is to decide on this necessity? Clearly those who hav to decide on the fact in issue. Throw a case of circumst evidence into the form of a syllogism, and it will be foun the major premiss rests solely on the erring experience tribunal to whom it is presented. Besides, these very ci stances must be proved, like direct facts, by witnesses, wh equally capable with others of deceiving[4] or of being dec

[1] The Acts, xxviii. 3—5. So, when Jacob saw Joseph's coat of many colours stained with kid's blood, "he knew it, and said, 'It is my son's coat; an evil beast hath devoured him; Joseph is *without doubt* pieces.'" Gen. xxvii. 33.

[2] Act ii., sc. 3.

[3] Act ii., sc. 4.

[4] Iago's story of the handkerchief, which goaded Othello to madne occur to everyone :—

"IAGO. Have you not sometimes seen a handkerchief,
Spotted with strawberries, in your wife's hand?
OTHELLO. I gave her such a one; 'twas my first gift.
IAGO. I knew not that; but such a handkerchief,
(I am sure it was your wife's,) did I to-day
See Cassio wipe his beard with.
OTHELLO. If it be that,—
IAGO. If it be that, or any that was hers,
It speaks against her, with the other proofs.
OTHELLO. Oh! that the slave had forty thousand lives—
One is too poor, too weak for my revenge!
Now do I see 'tis true."

OTHELLO, Act iii. S

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In no sense therefore is it possible to say, that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie.

§ 67. It may not be without some advantage to keep in mind the dangers against which juries should especially guard, in deciding cases supported by each species of testimony. In a case sought to be established by *direct* evidence the witnesses are usually few, and there consequently is the more reason to apprehend conspiracy and fraud; since it is far more easy to find two or three persons who, from motives of interest or malignity, will combine to aggrandise themselves, or to ruin an opponent, than to get together a larger number. The story, too, being for the most part simple, is readily concocted and remembered, while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. The uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c.,[1] or are known, like accomplices,[2] to be persons of bad character, and to have an interest in the result, are in consequence regarded with distrust, and, in practice, generally deemed insufficient to warrant a conviction.

§ 68. In cases supported by circumstantial evidence, juries should remember, that, although the number of facts drawn from apparently independent sources renders concerted perjury both highly improbable in itself, and easy of detection if attempted;[3] yet, the witnesses in such cases are more likely to make unintentional misstatements, than those who give direct testimony. The truth of the facts they attest depends frequently on minute and careful observation, and experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses, respecting dates, time, distances, footprints, handwriting, admissions, loose conversations, and questions of identity. Yet these in general are the links in the chain of circumstances, by which guilt is sought to be established. The number too of the witnesses, who must *all* speak the truth, or some link will be wanting, renders additional caution the more necessary. Besides, it must be remembered, that, in a case of

[1] 1 Hale, 635.
[2] R. v. Jones, 1809, 2 Camp. 131.
[3] Greenl. on Test. of Evang. § 40.

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§§ **68, 69.** circumstantial evidence, the facts are collected by *degrees*. Some thing occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Though both sportsmen and policemen alike would be horrified at anything unfair or "unsportsman like" yet, as both start with this object in view, it is easy to unintentionally misinterpret innocent actions, to misunderstand innocent words, for men readily believe what they anxiously desire,[1] and to be ever ready to construe the most harmless facts as confirmations of preconceived opinions.[2] These feelings are common alike to the police, to counsel, engineers, surveyors,[3] medical men, antiquarians, and philosophers; indeed, to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth.

§ 69. But, even where the facts sworn to are satisfactorily proved, the task of the jury in cases turning on circumstantial evidence is highly difficult. For they must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; since it is only on this last hypothesis that they can safely convict the accused.[4] The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.[5] Moral certainty and the absence of reasonable doubt are in truth one and the same thing.[6]

[1] A striking illustration of this was the credit that was given by the whole civilised world to the lying telegram which, in October, 1854, announced the fall of Sebastopol.

[2] Ante, § 57.

[3] Waters *v.* Thorn, 1856, 22 Beav. 547.

[4] R. *v.* Hodge, 1838, 2 Lew. C. C. 227.

[5] People *v.* Carlton, 1894, 40 A St. R. 346 (Am.); State *v.* Atkins 1894, 42 Am. St. R. 877 (Am.); St *v.* Clifford, 1892, 42 Am. St. R. (Am.).

[6] See cases cited in note [5], es cially State *v.* Atkinson.

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CHAPTER V.

PRESUMPTIVE EVIDENCE.

§§ 70, 71.

§ 70.[1] PRESUMPTIVE EVIDENCE is usually divided into two branches, namely, *presumptions of law* and *presumptions of fact*. PRESUMPTIONS OF LAW consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. Presumptions of law are sub-divided into two classes, namely, *conclusive* and *disputable*. For the general doctrines in accordance with which presumptions are made are not peculiar to municipal law, but are common to all departments of science. For instance, the presumption of a malicious intent to kill from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. The presumption, however, has more or less force, in proportion to the universality of the experience; and this furnishes the reason for the distribution of presumptions of law into the two classes which we have mentioned, namely, *conclusive* and *disputable*.

§ 71.[2] *Conclusive*, or, as they are sometimes termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment, and forbidding such averment to be overcome by any evidence that the fact is otherwise after the degree of proof which they demand has been furnished. Conclusive presumptions exist chiefly in those cases in which the long-experienced connexion, just alluded to, has been found so general and uniform, as to render it expedient for the common good, that such connexion should be taken to be inseparable and universal. They have

[1] Gr. Ev. § 14, largely.

[2] Gr. Ev. § 15, largely.

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§§ 71, 72. been adopted by common consent, from motives of con policy, for the sake of greater certainty, and the promoti peace and quiet in the community. Where they arise all c borative evidence is dispensed with, and all opposing evide forbidden.[1] It is at least questionable whether a concl presumption can ever be raised in support of a criminal cha

§ 72. Sometimes this common consent is expressly dec through the medium of the legislature in *statutes*. Thus, u the Bankruptcy Act, 1883, in the absence of fraud, the app of the Court, testified by a certificate of the official receiv conclusive as to the validity of any composition or general sc of arrangement, accepted in pursuance of the Act;[3] by the panies Act, 1900, a certificate of incorporation given b registrar in respect of any association is conclusive evi that all the requisitions of the Companies Acts in respe registration, and of matters precedent and incidental th have been complied with, and that the association is a com authorised to be registered and duly registered under the panies Acts;[4] by virtue of the Companies Act, 1862,[5] declaration of the chairman at a meeting of the shareho of a company that a special resolution has been ca on a show of hands, (a poll not having been dema is, at any rate in the absence of fraud, absolutely concl of the fact that the resolution has been carried;[6]

[1] The presumption in Roman law is defined to be, "conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a *lege* inducitur, vel a *judice*. Quæ ab ipsâ lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. *Priorem* doctores *præsumptionem* JURIS ET DE JURE, *posteriorem præsumptionem* JURIS, appellant. Quæ a *Judice* inducitur conjectura, *præsumptio* HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet." Hein. ad Pand., Pars iv. § 124. Of the former, answering to our conclusive presumption, Mascardus observes,—"Super hâc præsumptione lex firmum sancit jus, et eam *pro veritate habet*." 1 de Prob., Quæst. x. 48. An exception to the concl ness of this class of presumpt allowed by the civil law, whe presumption is met by an adm *in judicio*.

[2] In America it has been d that it cannot be. See note Am. St. Rep. p. 689 to Pec Cannon (Am.), 1893.

[3] 46 & 47 V. c. 52, § 18, sub-s 53 & 54 V. c. 71, § 3, sub-se As to presumptions which, i absence of fraud, arose unde Bankruptcy Act of 1869, see 3 V. c. 71, § 127.

[4] 63 & 64 V. c. 48, § 1, sub-s

[5] 25 & 26 V. c. 89, § 51.

[6] Arnot *v.* United African Co., [1901] 1 Ch. 518 (C. A.); Hadleigh Castle Gold Mining [1900] 2 Ch. 419 (Cozens-Hard

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the Workmen's Compensation Act, 1897, the certificate of a medical practitioner appointed for the purposes of the Act is conclusive evidence as to certain facts;[1] all the requisitions of the Public Schools Act, 1868, in respect to any statutes made by the governing body of a school, "shall be deemed to have been duly complied with," so soon as the statutes themselves have been approved by Her Majesty in Council;[2] under the Endowed Schools Act, 1869, an Order in Council approving a scheme is conclusive evidence of its validity;[3] under the Valuation Metropolis Act, 1869, "the valuation list for the time being in force shall be deemed to have been duly made;"[4] under the Act for the protection of bankers, it is enacted that "any draft or order drawn upon a banker payable to *order* on demand, which shall, when presented for payment, *purport* to be indorsed by the *person to whom the same shall be drawn payable*,"[5] shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker[6] to prove that such indorsement, or any subsequent indorsement, was made by, or under the direction of, the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof;[7] and, under the Stamp Act, 1891, "a bill of exchange or promissory note purporting to be drawn or made out of the United Kingdom, is, for the purpose of this Act, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."[8]

§ 73. Again: by the Statutes of Limitations,[9] where a simple

But this apparently is not so where the declaration appears to be bad on the face of it; see In re Carotal (New) Mines, Limited, [1902] 2 Ch. 489 (Buckley, J.).

[1] 60 & 61 V. c. 37, Sched. I., s. 11. M'Avan *v.* Boase Spinning Co., 3 F. 1048 (Ct. of Sess.) (Sc.).

[2] 31 & 32 V. c. 118, § 8, sub-sect. 4.

[3] 32 & 33 V. c. 56, § 47.

[4] 32 & 33 V. c. 67, § 45. See also "The Local Government Act, 1888" (51 & 52 V. c. 41).

[5] These words include the payee's agent, though not really authorised to indorse, see Charles *v.* Blackwell, 1877, C. A.

[6] This enactment does not protect any other person than a banker who takes a cheque on the faith of a forged indorsement. Ogden *v.* Benas, 1874.

[7] This Act is extended to drafts by the Paymaster-General by 35 & 36 V. c. 44, § 11. See, also, 45 & 46 V. c. 61, § 60. And see Hare *v.* Copland, 1862 (Ir.).

[8] 54 & 55 V. c. 39, § 36.

[9] 21 J. 1, c. 16 ("The Limitation Act, 1623"); 16 & 17 V. c. 113, § 20 (Ir.). The first-named Act is amended by 19 & 20 V. c. 97, § 9.

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§§ 73, 73a.

contract debt has not been distinctly recognised within six yea as a subsisting obligation, either in some writing signed by t party chargeable, or his agent, or by part payment of princip or by payment of interest,[1] such debt[2] is, at the end of the s years, conclusively presumed to have been paid; and a presum tion of satisfaction arises with respect to all injuries, the reme for which is an action on the case, other than slander, trespa to goods or land, or for detinue[3] or replevin, unless they ha been sued for within six years after the cause of action sh have accrued;[4] while actions for an assault or false imprisonme must be brought within four years;[5] for slander, within two years for compensation to the families of persons killed by accide within twelve calendar months from the death of the decease Actions under the Employers' Liability Act must be commenc within six months from the date of the accident, or, in case of dea "within twelve months from the time of death;"[7] and claims compensation under the Workmen's Compensation Act must made within six months after the injury, or, in case of dea "within six months from the time of death,"[8] and proceedi for the recovery of wages deducted contrary to the provisions the Truck Act must be likewise commenced within six months

§ 73A. The Public Authorities Protection Act, 1893,[10] enact that where, after 1st January, 1894, "any action, prosecuti or other proceeding is commenced in the United Kingdom agai any person for any act done in pursuance, or execution, intended execution of any Act of Parliament, or of any pub

[1] The St. of Limitat. 21 J. 1, c. 16, applies to an action of debt for a penalty under a by-law. Tobacco-pipe Makers' Co. *v.* Loder, 1851, 20 L. J. Q. B. 414.

[2] 9 G. 4, c. 14, § 1; 19 & 20 V. c. 97, § 13.

[3] See Wilkinson *v.* Verity, 1871, L. R. 6 C. P. 206, as to when the cause of action will accrue in detinue.

[4] 21 J. 1, c. 16, § 3. As to when concealed fraud and non-discovery can be pleaded in reply to a defence under the Stat., see Gibbs *v.* Guild, 1882, 9 Q. B. D. 59, C. A. See, also, Barber *v.* Houston, 1885, 18 L. R. Ir. 475.

[5] See note [9], ante, p. 75.

[6] 9 & 10 V. c. 93, § 3, as amen by 27 & 28 V. c. 95.

[7] 43 & 44 V. c. 42, § 4. A no that injury has been sustained m also be given "within six week though, in cases of death, the ju has power to relax the stringency this last rule.

[8] 60 & 61 V. c. 37, § 2, sub-sect A notice of the accident must also given under the Act as soon as pr ticable after the happening of accident.

[9] 59 & 60 V. c. 44, § 5.

[10] 56 & 57 V. c. 61.

[11] § 1.

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duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority, the following provisions shall have effect:— § 73a.

(*a*) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof:

(*b*) Wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client:

(*c*) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action:

(*d*) If in the opinion of the court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the court may award to the defendant costs to be taxed as between solicitor and client.

"This section shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority."

By § 2 of the Act last cited so much of any public general Act is repealed as enacts, with reference to any proceeding, that—

"(*a*) The proceeding is to be commenced in any particular place; or

(*b*) The proceeding is to be commenced within any particular time; or

(*c*) Notice of action is to be given; or

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§§ 73a, 74.

(*d*) The defendant is to be entitled to any particular ki
amount of costs, or the plaintiff is to be depriv
costs in any specified event; or

(*e*) The defendant may plead the general issue."

The section then repeals various older enactments.

A provision contained in an earlier Act, which was passe
1842,[1] provides that actions for anything done in pursuan
any public local and personal Act, or any local and persona
shall be brought within two years after the cause of action
have accrued, or in the case of continuing damage, withi
year after the damage shall have ceased.[2] Any action, pro
tion, or proceeding against any person for any act done in
suance or intended execution of the Army Act, 1881, or o
Militia Act, 1882, must be commenced within six months
after the act, neglect, or default complained of, or, in case
continuance of damage within six months next after the ce
thereof.[3] Actions and proceedings against persons acting u
the Seamen's Clothing Act, 1869,[4] or the Municipal Corpora
Act, 1882,[5] must be commenced within six months after th
complained of shall have been committed. Justices of the p
in England fall within the protection of the Public Autho
Protection Act, and in Ireland every action against a justi
the peace for anything done by him in the execution of his
must be brought within six months.[6] On similar principles,
a judgment has been obtained against a banking copartner
no execution can issue thereon against any former memb
such copartnership, after the expiration of *three years*
after the person sought to be charged shall have ceased t
a member.[7]

§ 74. Presumptions that their rights have been satisfied o
some other way extinguished are, in like manner, somet

[1] 5 & 6 V. c. 97.
[2] § 5.
[3] 44 & 45 V. c. 58, § 170, subsect. 1, amended by "The Army (Annual) Act, 1894" (57 V. c. 8), § 7; 45 & 46 V. c. 49, § 46.
[4] 32 & 33 V. c. 57, § 6.
[5] 45 & 46 V. c. 50, § 226.
[6] 12 & 13 V. c. 16 ("The Justices Protection (Ireland) Act, 1840"), § 8. In Scotland, under "The Sum Proc. Act, 1864," the period is at two months, 27 & 28 V. c § 35.
[7] 7 G. 4, c. 46, § 13 ("The Cou Bankers Act, 1826"). See I North of Engl. Joint Stock Co., Ex parte Gouthwaite, 185 L. J. Ch. 182; Barker *v.* Butt 1845, 13 L. J. Ch. 58.

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§§ 74, 74a.

y statute against the Crown or the Duchy of Cornwall. e right of the Sovereign,[1] or of the Duke of Cornwall,[2] to legal proceedings for the recovery of lands, rents, or , is barred, under several special statutes, by unin- l possession for a period of sixty, or in certain cases, of dred years.

Length of enjoyment, too, as between subjects of the aises a conclusive presumption of right. Thus, the pos- of land, or of rent,—not being land, or rent arising out of istered under the Land Transfer Acts,[3]—for the length of ntioned in the general statutes of limitation, under a claim ute title and ownership, constitutes a conclusive presump- valid grant;[4] the payment of a modus, or the *adverse*, and

3, c. 16, amended by "The y Rev. Act, 1888" (51 V. & 25 V. c. 62; 39 & 40 V.

8 V. c. 105, §§ 73 et seq.; V. c. 53; 24 & 25 V. c. 62 own Suits Act, 1861").
39 V. c. 87, § 21; 60 & 61 § 12.

period has for many years n shortened, at successive of the law, both in England United States. In 1833 the & 4 W. 4, c. 27 ("The Real Limitation Act, 1833"), § 2, nd barred all actions to re- l or rent, after twenty years time when the right of crued; unless, at such time, tiff or the party through claims shall have been me disability, specified in n which case he is allowed from the ceasing of the ; provided that in no case ction be brought after forty m the time when the right ued, although the period of shall not have expired: 17. This statutory rule is by §§ 24 and 25 to all claims for the recovery of land: College *v.* Att.-Gen., 1857, Ch. 620, H. L.; it also a claim for dower: Marshall 1865, 34 L. J. Ch. 189; to or compensation for equi- st:: D. of Leeds *v.* Ld. Amherst, 1846; 2 Ph. 117; and to the claim of an annuity charged upon land by will, the twenty years in this last case being calculated from the death of the testator: James *v.* Salter, 1837, 3 Bing N. C. 544. The sections just referred to do not, however, apply to spiritual or eleemosynary corporations sole, who are empowered by § 29 to bring actions or suits to recover land or rent within two successive incumbencies and six years, or, in case these periods do not amount to sixty years, then within sixty years next after the right of action shall first have accrued. See Ecclesias. Commis. *v.* Rowe, 1880, 5 App. Cas. 736, H. L. §§ 30—33 limit the time within which advowsons can be recovered, while § 40 enacts, that all moneys charged upon land and legacies shall be deemed satisfied at the end of twenty years, unless some interest shall have been paid, or some written acknowledgment shall have been given in the meanwhile. Under § 28 no mortgagor shall bring a suit to redeem a mortgage but within twenty years from the time when the mortgagee took possession (see Kinsman *v.* Rouse, 1881, 17 Ch. D. 104), or from the last written acknowledgment of the mortgagor's title. Mortgagees also may bring actions to recover land at any time within twenty years next after the last payment of any part of the principal or interest

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§§ 74a—75a.

as *of right* enjoyment of land tithe-free, for the periods specifi in the Act of 2 & 3 W. 4, c. 100,[1] conclusively bars the right all parties, even the Queen, to recover tithes, unless such payme has been made, or enjoyment had, under an express writt consent or agreement.[2]

§ 75. The principle that, by statute, rights are after a cert time to be presumed to be extinguished is further exemplified the rule that on the completion of any contract of sale of la the period of the commencement of title which a purchaser m require (or, in the language of conveyancers, the root of title) except in the case of land registered under the Land Trans Acts,[3] now fixed by statute at forty years, unless there be so stipulation to the contrary in the contract, or some very spec circumstances in the case.[4]

§ 75A. Again, by the Prescription Act, 1832,[5] the length

secured by the mortgage: 7 W. 4 & 1 V. c. 28; Doe *v.* Eyre, 1851, 20 L. J. Q. B. 431; Doe *v.* Massey, 1851, 20 L. J. Q. B. 434; Ford *v.* Ager, 1863, 32 L. J. Ex. 138; provided that such last payment be itself within twenty years from the date of the mortgage: Hemming *v.* Blanton, 1873, 42 L. J. C. P. 158; and provided that the payment be made by the mortgagor, or by some person bound to make it on his behalf: Harlock *v.* Ashberry, 1882, 19 Ch. D. 539; Bradshaw *v.* Widdrington, [1902] 2 Ch. 430. On 1st January, 1879, the "Real Property Limitation Act, 1874" (37 & 38 V. c. 57), came into operation, and by it these periods of limitation were reduced by six, twelve, and thirty years being substituted for the ten, twenty, and forty years mentioned in the Acts of 1833 and 1837. 6 & 7 V. c. 54, and 7 & 8 V. c. 27, extend to Ireland such of the provisions of 3 & 4 W. 4, c. 27, as were not already in force there, and explain and amend that Act. The period of twenty years has been adopted in most of the United States. See 4 Kent, Com. 188, n. *a*. The same period in regard to the title to real property, or, as some construe it, only to the profits of the land, is adopted in the Hindoo law: 1 Macnagh. Elem. of Hindoo L. 201. See, as to the Scotch l 37 & 38 V. c. 94, §§ 13, 34.

[1] See Salkeld *v.* Johnson, 1848 L. J. Ex. 89. See, also, Fellowe Clay, 1842, 12 L. J. Q. B. 202. Salkeld *v.* Johnson, 1846, 2 C. 749.

[2] See Toymbee *v.* Brown, 1849 L. J. Ex. 99.

[3] 60 & 61 V. c. 65, § 16.

[4] 37 & 38 V. c. 78 ("The Ven and Purchaser Act, 1874"), § 1.

[5] 2 & 3 W. 4, c. 71,—extended Ireland by 21 & 22 V. c. 42,—lir the period of legal memory as follo —In cases of rights of common other profits or benefits arising of lands, except tithes, rent, services, primâ facie to thirty ye and conclusively to sixty ye unless it shall appear that s rights were enjoyed by some cons or agreement expressly given made by deed or writing: § 1; cases of ways or other easeme watercourses, or the use of wa primâ facie to twenty years, conclusively to forty years, unles shall be proved, in like manner, written evidence, that the same w enjoyed by consent of the own § 2; and in cases of lights, conc sively to twenty years, unless it sl be proved, in like manner, that same were enjoyed by consent:

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§§ 75a—75c.

which constitutes the period of legal memory, or, in other ls, which affords a legal title in respect of incorporeal rights,[1] been definitely fixed.

75B. Further, by the Real Property Limitation Act, 1833,[2] time within which actions for rent due under a lease, actions venant,[3] or debt on specialties,[4] and debt or *scire facias* on a gnizance,[2] may be brought, is expressly limited. So, like-, by the same enactment, is the time for actions for debt or n award, where the submission is not by specialty; for copy--fines, escapes, money levied on a *scire facias*, or for alties.[5]

75C. Again, as regards religious trusts. Where any real or onal estate, subject to a trust for a Roman Catholic charity, been applied upon some trusts connected with that religion wenty years, but the original trusts cannot be ascertained by document, a *consistent usage of twenty years* is, by statute,

Bewley *v.* Atkinson, 1880, 13 D. 283; Tapling *v.* Jones, 1865, . J. C. P. 342; Lanfranchi *v.* kenzie, 1857, 36 L. J. Ch. 518; ley *v.* Glover, 1875, L. R. 10 Ch. § 4 directs, that the before-ioned periods shall be deemed next before some suit or action cting the claims, and further es what shall amount to an ruption. § 6 enacts, that no pre-otion shall be made in support of claim, upon proof of the enjoy- of the right for any less period the period mentioned in the Act pplicable to the nature of the . § 7 provides for parties who nder legal disabilities. As to evidence of user is necessary r this Act, see Lowe *v.* Car-er, 1851, 20 L. J. Ex. 374; ins *v.* Verney, 1884, 13 Q. B. D. C. A.

A right to the passage of air and to a garden: Potts *v.* Smith, L. R. 6 Eq. 311; or of air to a mill or house, is not within the ning of this Act: Webb *v.* Bird, 31 L. J. C. P. 335; Bryant *v.* ver, 1879, 4 C. P. D. 172, C. A.; s a claim of "a free fishery" in waters of another proprietor: tleworth *v.* Le Fleming, 1865, 34 L. J. C. P. 309; Smith *v.* Andrews, [1891] 2 Ch. 678. For "prescription presupposes a grant," see Smith *v.* Andrews, supra, and no grant of the right claimed can here be imagined.

[2] 3 & 4 W. 4, c. 42. As to specialties, see § 3 of this Act. § 4, as amended by 19 & 20 V. c. 97, § 10, provides for parties under legal disabilities, and § 5 states the effect of an acknowledgment in writing or part payment. See the Irish Act of 16 & 17 V. c. 113, §§ 20—24; also Alliance Bk. of Simla *v.* Carey, 1870, 5 C. P. D. 249.

[3] See In re Baker, Collins *v.* Rhodes, 1882, 20 Ch. D. 230.

[4] The term "specialty" includes all actions on statutes, as, for instance, an action against a shareholder of a company for calls: Cork & Bandon Rail. Co. *v.* Goode, 1853, 22 L. J. C. P. 198; Shepherd *v.* Hills, 1857, 26 L. J. Ex. 6.

[5] See, also, as to actions for penalties, 31 El. c. 5, § 5, as limited by 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), § 36, and amended by "The Stat. Law Rev. Act, 1888" (51 V. c. 3), and Robinson *v.* Curry, 1881, 7 Q. B. D. 465; overruling Dyer *v.* Best, 1866, L. R. 1 Ex. 152.

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§§ 75c—76-8. rendered conclusive evidence of the trusts on which the pr has been settled.[1] Under Lord Lyndhurst's Act for regu suits relating to meeting-houses and other property hel religious purposes by dissenters, *the usage for twenty-five* immediately preceding any such suit shall be taken as conc evidence that the religious doctrines, opinions, or mode of wo which for that period have been taught or observed in houses, may properly be taught or observed, provided the trary is not declared by the instrument declaring the tru such houses, either in express terms or by reference to some document.[2]

§§ 76-8. The principle that after the lapse of a certain it must be presumed that the offender is innocent, or, events, must not be called upon to defend himself, is als which finds a place in Criminal Jurisprudence. Many st accordingly limit the period within which particular offe may be prosecuted. Some of the principal of these are men in the footnote.[3] Clauses of this nature will be found in

[1] 23 & 24 V. c. 134, § 5.

[2] 7 & 8 V. c. 45 ("The Nonconformist Chapels Act, 1844"), § 2. See Att.-Gen. *v.* Bunce, 1868, L. R. 6 Eq. 563.

[3] The undermentioned statutes (arranged in alphabetical order) prescribe periods of limitation which are respectively as follows, viz.:— "The Army Act, 1881" (44 & 45 V. c. 58, § 161), creates a limitation of three years for offences other than mutiny, desertion, or fraudulent enlistment, and by it absolute immunity is conferred (except for the offence of desertion on active service) by three years' exemplary service; "The Births and Deaths Registration Act, 1874" (as to England, 37 & 38 V. c. 88, § 46, and as to Ireland, 43 & 44 V. c. 13, § 36), creates a limitation of three years; "The Clergy Discipline Act, 1892" (55 & 56 V. c. 32, § 5, with which compare former Acts on this subject, as construed in Denison *v.* Ditcher, 1857, Deane and Swabey, 334; Ditcher *v.* Denison, 1857, 11 Moo. P. C. 324; Bishop of Hereford *v.* T——n, 1853, 2 Roberts, Eccl. R. 595; and Simpson *v.* Flamank, 1867, L. R. 1 P. creates (by § 5) a limitation years, or of two years after tion by a temporal court; Coal Mines Regulation Act, (50 & 51 V. c. 58, § 62), one o months; "The Corrupt Pr Act, 1883" (46 & 47 V. c. 5 and Part 12 of "The Municip porations Act, 1882," viz., 4 V. c. 50, § 78), unless against who has absconded, creates a tion of one year from date of c or within three months after of commissioners; offences "The Customs Act, 1876" (3 V. c. 36, § 257), must be pros within three years from comm of the offence; offences agains Diseases of Animals Act, (57 & 58 V. c. 57), must be pros within the time limited by the mary Jurisdiction Acts (whic informations under "The En ment of Children Act, 1903" (3 c. 45, § 7), must be laid within months from the commission offence; offences against "Th tory and Workshops Act, (1 Edw. 7, c. 22, § 146, sub-s

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of statutes, to which it is considered unnecessary to make lar reference.[1] §§ 76-8.

hree months after the date h the offence comes to the ge of the inspector for the within which the offence is to have been committed, or n inquest has been held, then wo months after the conclu- the inquest, but in no case e expiration of six months e commission of the offence; declaration, in order to a marriage to take place out roper district (3 & 4 V. c. 72, thin eighteen months from riage; high treason, or mis- f treason (7 W. 3, c. 3, §§ 5, 6, d to Scotland 7 Anne, c. 11), three years after offence; y proceedings under "The nt Shipping Act, 1894" (57 & 60, § 683), on the construc- which see Austin *v.* Olsen, . R. 3 Q. B. 208, must be taken six months, but in ses within two months of the the alleged offence; offences the Marriage Acts (the Eng- Marriage Act, 1836," being V. 4, c. 85, on the construction h see R. *v.* Ld. Dunboyne, C. & Kir. 1, and the Irish ng 7 & 8 V. c. 27, § 13), within ears, or in the case of offences he Irish Act, punishable on y conviction (7 & 8 V. c. 81, 8; also 26 & 27 V. c. 27, § 16), three months, or in the case declarations to procure a e out of its proper district, he time stated above, under False Declaration"; "The Regulation Act, 1872" (35 & c. 76, § 63, r. 1; and c. 77, 1, extended to Isle of Man by 5 V. c. 47), requires offences it to be prosecuted within onths; "The Municipal Cor- ns Act, 1882" (45 & 46 V. § 219, sub-sect. 1), requires ings for offences and fines it to be taken within six from act; proceedings under blic Health Acts (of 1875, gland, being 38 & 39 V. c. 55, nd of 1878, being 41 & 42 V. § 250, for Ireland) must be taken within six months from when matter arose; proceedings under "The Naval Discipline Act, 1866" (29 & 30 V. c. 109, § 54), within three years from offence, or if offender has been abroad, one year from his return; proceedings under "The Night Poaching Act, 1844" (being 7 & 8 V. c. 29), are, as to indictable offences (by 9 G. 4, c. 69, § 4, and 7 & 8 V. c. 29, as to the construction of which see R. *v.* Casbolt, 1869), to be within twelve calendar months; and as to offences punishable on summary conviction, to be within six calendar months, the commencement of the prosecution being the laying of an information, or the obtaining of a warrant: see R. *v.* Parker, 1864, 33 L. J. M. C. 135; R. *v.* Hull, 1860, 2 F. & F. 16; R. *v.* Brooks, 1847, 2 C. & Kir. 402; R. *v.* Killminster, 1835, 7 C. & P. 228; and R. *v.* Mainwaring, 1858, 27 L. J. M. C. 278; under "The Prevention of Cruelty to Children Act, 1904" (4 Edw. 7, c. 15), by § 18 (3) a summary conviction for an offence against the Act or for an offence against any of the enactments mentioned in the first schedule thereto must be within six months of the offence; under "The Sale of Food and Drugs Act, 1899" (62 & 63 V. c. 51, § 19), prosecutions in cases where the food or drug has been purchased for test purposes must be instituted within twenty-eight days from the time of the purchase. The Summary Jurisdiction Acts, in all cases where no time is specially limited, require that complaint shall be made, and information laid, within six calendar months. See "The Summary Jurisdiction Act, 1848" (11 & 12 V. c. 43), § 11.

[1] Various periods of limitation are also imposed by 11 & 12 V. c. 118, § 3; 1 G. 1, st. 2, c. 5, § 8; 33 G. 3, c. 67, § 8; 4 G. 4, c. 76, § 21 ("The Marriage Act, 1823"); 60 G. 3 & 1 G. 4, c. 1 (partially repealed by "The Stat. Law Rev. Act, 1893," 56 & 57 V. c. 61), § 7; 6 A. c. 7, § 3; 23 & 24 V. c. 107, § 32 (Ir.) ("The Refreshment Houses

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§§ 79, 80. § 79. The principle upon which these statutes rest v
appear to be simply the broad one of general expedience
justice, rather than upon that of any presumption,
"Interest reipublicæ ut sit finis litium." When a party
been in undisputed possession of property for a conside
length of time, it is harsh to deprive him of that which,
ever obtained, has now acquired the character of a v
interest. No presumption of a former grant is, however, r
sary to give validity to his title, but it rests on the fact of
uninterrupted enjoyment. When a person has foregone a
for many years, there is, indeed, no need for presuming th
has, in reality, been satisfied; it is sufficient to say tha
right to recover is lost by his own negligence. The statu
James, which has been held not to discharge the debt
merely to bar the remedy, is strongly confirmatory of
views.[1] Lord Plunket once eloquently said, "If Time des
the evidence of title, the laws have wisely and humanely
length of possession a substitute for that which has
destroyed. He comes with his scythe in one hand to mow
the muniments of our rights; but in his other hand the
giver has placed an hour-glass, by which he metes out incess
those portions of duration, which render needless the evi
that he has swept away."[2]

§ 80.[3] The doctrines of irrebuttable presumptions are
times (as in most of the instances just cited) embodi
statutes. In other instances they are declared by ju
tribunals as being the *common law* of the land. The dec

(Ireland) Act, 1860"); 14 & 15 V. c. 93, § 10, r. 4 (Ir.); "The Merchandise Marks Act, 1887" (50 & 51 V. c. 28), § 15. In Scotland summary complaints must, in general, be instituted "within six months from the time when the matter of such complaint arose." 27 & 28 V. c. 53, § 24. See as to the Police Courts in Edinburgh, 30 & 31 V. c. 58, sch. § 172.

[1] Spears *v.* Hartly, 1857, 3 Esp. 81; Higgins *v.* Scott, 1832, 2 B. & Ad. 413.

[2] See "Statesmen of the Time of George III.," by Ld. Brougham, 3rd Ser. p. 227, n. In Malone *v.* O'Connor, 1859, Drury's Cas. temp. Napier, 644 (Ir.). Napier, above passage is cited as foll "Time, with the one hand down the muniments of our with the other, he metes o portions of duration which these muniments no longer sary." This version is pr more accurate than any oth it was furnished to the Cha by one of the counsel in the *impedit*, on the trial of whi Plunket made use of the imag his address to the jury.

[3] Gr. Ev. § 17, as to first six

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§ 80.

courts on such matters are respected, equally with the nents of the legislature, as authoritative declarations of ative rules of law, against the operation of which no aver- or evidence is received. In short, in determining the legal and liabilities of parties, the courts conclusively presume hich in a vast number of cases must of course be contrary fact.[1] For instance, it is conclusively presumed that every person, above the age of fourteen, is acquainted with the al as well as the civil,[2] the common[3] as well as the statute,[4] the land; and the doctrine "ignorantia juris, quod quisque scire, neminem excusat," is as uniformly recognised in untry as it formerly was in ancient Rome;[5] and, indeed, en carried so far as to include the case of a foreigner, who ere charged with a crime, which was no offence in his own y.[6] It is again conclusively proved that every[7] sane man age of discretion contemplates the natural and probable *uences* of his own acts. Thus an intent to kill is conclusively ed from the deliberate violent use of a deadly weapon;[8] an to do it maliciously is in point of law inferred from unlaw- ublishing a libel;[9] on an indictment for cutting with intent

ê Martindale *v.* Falkner, 1846, J. C. P. 91.

bie *v.* Lumley, 1802, 2 East,

nistake of the legal effect of a ent cannot be set up as a e. Powell *v.* Smith, 1872, 14 Eq. 85.

e Stokes *v.* Salomons, 1851, 20 Ch. 343; The Charlotta, 1814, s. Adm. 392; Middleton *v.* 1736, Str. 1056.

e 1 Russ C. & M. 154; 1 Hale, . 22, 6, 9.

v. Esop, 1836, 7 C. & P. 456; et's case, 1853, 22 L. J. 25.

. Ev. § 18, as to four following

e 1 Russ. C. & M. 940, 941; Dixon, 1814, 3 M. & S. 15. death does not ensue till a year day, that is, a full year, after ke, it is conclusively presumed e stroke was not the sole cause death, and it is not murder. Com. 197; Glassf. Ev. 592. ctrine of presumptive evidence

was familiar to the Mosaic Code; even to the letter of the principle stated in the text. See Numb. xxxv. 16, 17, 18, where every instrument of *iron* is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumptive of malice The same presumption arose from *lying in ambush*, and thence destroying another. Id. v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and in the absence of express malice, the offence was reduced to the degree of manslaughter, as at the common law. Id. vv. 21, 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life, in all cases, except where the culprit is a Brahmin. "If a man deprives another of life, the magistrate shall deprive that person of life." Halhed's Gentoo Laws, b. xvi. § 1, p. 233.

[9] And an indictment for "unlawfully publishing a libel" is therefore

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§§ **80, 81.** to do the prosecutor some grievous bodily harm,[1] the prisone rightly convicted, though it appeared that his real intent wa wound another person;[2] an intent to defraud a particular p will be conclusively presumed on an indictment for forgery, vided the defrauding of such party would be the natural resu the prisoner's act, if successful,[3] and this even though it be pr that the prisoner did not entertain the intention charged.[4] U a charge of obtaining goods by false pretences with inter defraud, if it be proved that the defendant obtained the good false pretences an intent to defraud is presumed. Thus, case where the jury found that the defendant, who had obta goods by false pretences, intended at the time he so obtained goods to pay for them when it should be in his power t so,[5] it was held that this finding of the jury had not negat the intention to defraud; and on a charge of arson for se fire to a mill, an intent to injure or defraud the mill-ow will be conclusively inferred from the wilful act of firing.[6] same doctrine would, apparently, on principle, apply to all c crimes.[7]

§ 81. There are, indeed, several decisions which tend to s that where the character of statutory offences varies accordi the intent with which they are perpetrated, the *real* intenti the prisoner must be left to the jury. For instance, on an in ment for cutting,[8] where the intent laid in the several counts to murder, to disable, and to do grievous bodily harm, but intent found by the jury was to prevent being apprehended that the accused had no other intent, it was held that a convi

good without an averment that the defendant published it "maliciously." R. *v.* Munslow, [1895] 1 Q. B. 758.

[1] Under the repealed Act of 43 G. 3, c. 58.

[2] R. *v.* Hunt, 1825, 1 Moo. C. C. 93; R. *v.* Fretwell, 1864, 9 Cox, C. C. 471. See, also, R. *v.* Smith, 1855, Dears. 559, which was an indictment under the repealed Act, 7 W. 4 & 1 V. c. 85, § 3; and R. *v.* Ward, 8 C. & P. 143, under 14 & 15 V. c. 19, § 5 (fifteen judges).

[3] R. *v.* Beard, 1837, 8 C. & P. 143; R. *v.* Hill, 1838, 8 C. & P. 276; R. *v.* Cooke, 1838, 8 C. & P. 582.

[4] R. *v.* Sheppard, 1806, R. & R. 169; R. *v.* Mazagora, 1815, R. 291 (all the judges); R. *v.* C 1840, 9 C. & P. 499. The pr may also be convicted on a charging the real intent. Hanson, 1841, C. & Marsh. 33 all the judges).

[5] R. *v.* Naylor, 1865, L. C. C. R. p. 4.

[6] R. *v.* Farrington, 1811, R. 207; R. *v.* Philp, 1830, 1 Moo. 263.

[7] See R. *v.* Murphy, 1875, 13 C. C. 298.

[8] Under the repealed Act G. 3, c. 58.

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ot be sustained, though the prisoner had inflicted a wound;[1] where a party was charged with inflicting an angerous to life with intent to murder, it was held[2] that must be satisfied that the prisoner, at the time he com- he assault, had formed a deliberate intention of murdering m; on an indictment[3] charging the prisoner with shooting prosecutor with intent to murder him, the jury were to pronounce a verdict in accordance with the actual which was to kill another person, and the prisoner was ently acquitted;[4] on the same principle, where the was charged[5] with causing poison to be taken by the or with intent to murder him, and it appeared that the 's real intention was to poison another party, he was d.[6]

Whether these cases were ever good law has been, and l be, doubted.[7] Such a question will however not arise They were decided upon the wording of § 11 of 4, c. 31, which contained the words "with intent to *such person*." In § 14 of the Offences against the Act, 1861,[8] which repealed § 11 of the Act above ed, probably in consequence of these cases, the words person" are omitted, and the intent is generally "to "

. It is immaterial whether the intent charged be the l or subordinate motive which instigated the commission

Duffin, 1818, R. & R. 365. e is badly reported, and he decision turned upon the at the attempted apprehen- not lawful.

Cruse, 1838, 8 C. & P. 545. ury *may* infer such intent circumstance that if death caused it would, under the nces, have been murder: R. 1840, 9 C. & P. 260.

r 9 G. 4, c. 31; repealed by . c. 95, and other provisions 24 & 25 V. c. 100 ("The against the Person Act,

Holt, 1836, 7 C. & P. 518. ed judge observed, in sum- "If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this Act of Parliament."

[5] Under 7 W. 4 & 1 V. c. 85, § 2; repealed by 24 & 25 V. c. 95, and other provisions enacted in 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), amended by 48 & 49 V. c. 69.

[6] R. *v.* Ryan, 1839, 2 M. & Rob. 213.

[7] See the opinion expressed by Gurney, B., in R. *v.* Lewis, 1833, 9 C. & P. 161, and R. *v.* Jarvis, 1837, 2 M. & Rob. 40.

[8] 24 & 25 V. c. 100.

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§§ 82a, 83.

of the crime. Therefore where the jury found that a pri had wounded the prosecutor with the view of preventin lawful apprehension, and that, *in order to effect that purpo* intended to do him some grievous bodily harm, the conv on a count charging the latter offence was held right.[1] An same rule has been applied where the immediate object criminal was to rob the party he wounded, and the woun inflicted as the means of effecting the robbery.[2]

§ 83. The presumption that a party intends the n consequences of his acts, also extends to civil responsib Thus, in an action for libel,[3] the deliberate publicati calumny, which the publisher knows to be false, or h reason to believe to be true, is by statute taken to r conclusive presumption of malice;[4] if a party make a sentation, which he knows to be false, and injury ensu another, it will be inferred by law that he was actuated fraudulent or malicious intent;[5] the wilful neglect of a dant to plead within the time appointed by law, is conclusively against him as a confession of the plaintiff's of action;[6] if a person who is, in the language of the Bank Act, "unable to pay his debts as they become due from hi money," spontaneously make a transfer or payment in favour creditor, which necessarily has the effect of defeating or de his other creditors, it will be conclusively presumed to hav made with that intent, and the transfer or payment will be se as fraudulent, though all fraud in fact may be distinctly neg if the payer or transferor is adjudged bankrupt on a p presented within three months from the date of the transa

[1] R. *v.* Gillow, 1825, 1 Moody, C. C. 85.

[2] R. *v.* Bowen, 1841, C. & Marsh. 149.

[3] See 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 6.

[4] Haire *v.* Wilson, 1829, 9 B. & C. 643; R. *v.* Shipley, 1784, 4 Doug. 73, 177; Fisher *v.* Clement, 1830, 10 B. & C. 475; Baylis *v.* Lawrence, 1840, 11 A. & E. 926; Rodwell *v.* Osgood, 1825, 3 Peck, 379 (Am.).

[5] Tapp *v.* Lee, 1803, 3 B. & P. 371; Foster *v.* Charles, 1830, 6 Bing. 396; Pontifex *v.* Bignold, 1841, 10 L. J. C. P. 259.

[6] R. S. C. 1883, Ord. XXV et seq. The principle of this belongs to general jurispr So in the Roman law: "Cont eorum, qui jus dicenti non perant, litis damno coercetur." lib. 42, t. 1, l. 53. "Si citatus non compareat, habetur pro tione." 3 Masc. de Prob. con-cl. 1159, n. 26.

[7] 46 & 47 V. c. 52, § 48, a 36 V. c. 58, § 53 (Ir.). See E Craven, 1870, L. R. 10 Eq. re Craven, Ex parte Tempes

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. Conclusive presumptions are, again, made in favour of licial proceedings. Thus, as an undoubted rule of plead- othing will be intended to be out of the jurisdiction of a or court but that which is so expressly alleged, so that the s of superior courts, among which are the courts of the ies Palatine, need not state the cause of action to have within the jurisdiction;[1] whenever the contrary does not and expressly appear, the respective Houses of Parlia- will be conclusively presumed to have acted within their ction, and agreeably to the usages of Parliament and the f law and justice. So that a warrant issued by the Speaker House of Commons at the instance of the House for the of a witness need not contain any recital of the grounds on it was founded;[2] all writs issued by any Division of the Court of Justice are presumed to be issued duly in a case ch the court has jurisdiction, unless the contrary appears face of them, so that such writs of themselves, and without rther allegation, protect all officers and others in their aid under them, and this even though they appear on the face n to be irregular, or even void in form.[3] The respect due High Court, and the credit given to it, that it will not its powers, furnish alike the reason and the justification s somewhat arbitrary presumption.[4] A sheriff is however if he, or his bailiff, exceed the powers contained in the writ he is executing, as, for instance, if he seize the wrong or the wrong goods.[5]

.[6] The irrebuttable presumption that all judicial pro- gs have been regularly conducted, has, among others, the

Ch. 70; Brown *v.* Kempton, 9 L. J. C. P. 169; In re rough, 1871, L. R. 12 Eq. nith *v.* Cannan, 1854, 22 L. J. 91; In re Wood, 1872, L. R. 302; Ex parte Bailey. In re 1852, 22 L. J. Bk. 45; one *v.* Cooke, 1856, 25 L. J. 81; Bell *v.* Simpson, 1857, 26 x. 363; Bills *v.* Smith, 1863, J. Q. B. 68. See, also, as to idance of voluntary settle- 46 & 47 V. c. 52, § 47; and V. c. 58, § 52 (Ir.).

cock *v.* Bell, 1667, 1 Wms. Saund. 75, recognised in Gosset *v.* Howard, 1847, 16 L. J. Q. B. 345.

[2] Gosset *v.* Howard, 1847, supra.

[3] Id., citing Countess of Rutland's case, 1605, 6 Co. Rep. 54 *a*; and Parsons *v.* Loyd, 1772, 3 Wils. 341.

[4] Id. See the elaborate judgment of Ex. Ch. in Gosset *v.* Howard, supra.

[5] 50 & 51 V. c. 55, § 15; Woodgate *v.* Knatchbull, 1787, 2 T. R. 149; Smart *v.* Hutton, 1833, 8 Ad. & E. 568.

[6] Gr. Ev. § 12, as to one or two lines.

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§ 85. following consequences. It is assumed, at least primâ facie the unreversed sentence of a foreign or colonial court of petent jurisdiction is correct, since otherwise our courts be, in effect, constituting themselves courts of appeal, wi power to reverse the judgment.[1] Judicial acts are, as a ge rule, conclusively presumed to have taken place at the ea period of the day on which they were done, so that a judg is regular though signed several hours after the defendan died,[2]—provided only this doctrine does not work injusti any particular case;[3] and with the further limitation th does not apply to the issuing of a writ of summons, since did, a plaintiff could not commence legal proceedings til day after the cause of action had accrued, and the defenda the meanwhile might escape out of the jurisdiction.[3] The *re* of a court of justice, and indeed all records, must again a be presumed to have been correctly made;[4] so that no evi will be admissible to show that a charter granted by the C was made or delivered at another time than when it bears d while the day specified in a record of conviction will be concl proof of the commission day of the assizes at which the took place,[6]—though (as in the case just mentioned) the will, where it is necessary to do so, in order to prevent ju being defeated,[7] allow the party against whom the record is duced to show by parol evidence the actual day of trial, an judicially notice that though by fiction of law the whole ti the assize is only one legal day, yet this legal day may co of many natural days, and thus prevent justice from defeated by a mere arbitrary rule;[7] and will on production Nisi Prius record containing two counts, on distinct caus action, admit parol evidence to show that on a verdict enter

[1] Brenan's case, 1847, 16 L. J. Q. B. 289; Robertson *v.* Struth, 1843, 5 Q. B. 942.

[2] Wright *v.* Mills, 1859, 28 L. J. Ex. 223; Edwards *v.* R., 1854, 23 L. J. Ex. 165.

[3] Clarke *v.* Bradlaugh, 1881, 8 Q. B. D. 63.

[4] Reed *v.* Jackson, 1801, 1 East, 355; Ramsbottom *v.* Buckhurst, 1814, 2 M. & S. 567; R. *v.* Carlile, 1832, 2 B. & Ad. 367. "Res judicat veritate accipitur." Dig. li t. 17, l. 207.

[5] Ludford *v.* Gretton, 1576, 490.

[6] See Thomas *v.* Ansley, 18 Esp. 80; R. *v.* Page, 1788, 6 Es

[7] Whitaker *v.* Wisbey, 185 L. J. C. P. 116; Roe *v.* Hersey, 3 Wils. 274.

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damages to the plaintiff generally, the substantial were recovered on one count only.[1] In these two last- ases proof of the real facts would not *contradict* the it merely *explain it*. On the principle, too, that every ion necessary to sustain a record will be made, it will lict, whether in a civil or a criminal case,[2] be presumed e facts, without proof of which the verdict could not n found, were proved, though they are not distinctly n the record; provided such record contains terms ly general to comprehend them in reasonable intend- In other words, the verdict will cure any *defective* t, though it will not cure the *omission* of any material .[4] It is, again, always a presumption of law that the en by the judge at Nisi Prius are correct. If the judge nty court has taken no notes, or if his notes are not , there is power in the court hearing an appeal from him any evidence or statement of what occurred before such ich the court may deem sufficient.[5] It has been held that is allowed to raise on appeal any question respecting ion of evidence at the trial, unless it appears from the he judge that the evidence was formally tendered.[6] The practice is, however, to allow the judge's notes to be nted (but not contradicted) by a shorthand note, or by note, of what took place in the court below, and it is probable that, if once the Court of Appeal were satisfied ence had in fact been tendered and rejected in the court ey would refuse to allow the point to be taken simply he judge had omitted to make a note of it.

A conclusive presumption in favour of an act is s raised by the solemnity with which it was done,

n *v.* Peeke, 1858, 27 L. J. Vaters, 1848, 18 L. J. M. C. Bowen, 1849, 19 L. J. M. C. ann *v.* R., 1873, L. R. 8 R. *v.* Goldsmith, 1873, 12 479; R. *v.* Aspinall, 1876, . C. 145.

n *v.* Pesked, 1813, 1 M. & pieres *v.* Parker, 1786, 1 Davis *v.* Black, 1841, 10 338; Harris *v.* Goodwyn, 1841, 2 M. & Gr. 405; Goldthorpe *v.* Hardman, 1845, 14 L. J. Ex. 61. See, also, Smith *v.* Keating, 1849, 6 C. B. 136; Kidgill *v.* Moor, 1850, 19 L. J. C. P. 177; and Ld. Delamere *v.* The Queen, 1867, L. R. 2 H. L. 419.

[4] Bradlaugh *v.* R., 1878, 3 Q. B. D. 607, C. A.

[5] R. S. C., Ord. LIX., r. 8.

[6] Gibbs *v.* Pike, 1842, 12 L. J. Ex. 257.

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§§ 86, 86a.

though it was not done in court. Thus, where an professes to be made de præmissis, the presumption is the arbitrator intended to dispose finally of all matte difference, and if by any intendment it can be made so, his will be held final;[1] a bond, or other specialty, is, so long remains unimpeached,[2] presumed to have been made upon consideration, and for the consideration stated on it.[3] A the Bills of Lading Act, 1855,[4] "every bill of lading i hands of a consignee or indorsee for valuable consider representing goods to have been shipped on board a vessel, be conclusive evidence of such shipment as against the mas other person *signing the same*,[5] notwithstanding that such or some part thereof may not have been so shipped, unless holder of the bill of lading shall have had actual notice a time of receiving the same, that the goods had not been i taken on board; provided that the master or other pers signing may exonerate himself in respect of such misrepre tion, by showing that it was caused without any default c part, and wholly by the fraud of the shipper, or of the hold of some person under whom the holder claims." Again, i statute enacted that every conveyance made under the A facilitating the sale and transfer of land in Ireland shall be all purposes conclusive evidence" that all previous proce leading to such conveyance have been regularly taken;[6] an every declaration of title by the Landed Estates Court sh as conclusive upon the rights of all parties as any such d conveyance.[7]

§ 86A. Again, when (as is now often the case) the cont made by one party delivering to the other a document, common form containing the proposed terms, if the fo

[1] Harrison *v.* Creswick, 1853, 21 L. J. C. P. 113; Jewell *v.* Christie, 1867, L. R. 2 C. P. 296.

[2] Lowe *v.* Peers, 1768, 4 Burr. 2225; Story, Bills, § 16. See post, § 148.

[3] Barton *v.* Bank of New South Wales, 1890, 15 App. Cas. 379 (P. C.).

[4] 18 & 19 V. c. 111, § 3.

[5] See Meyer *v.* Dresser, 1864, 33 L. J. C. P. 289; Jessel *v.* Bath L. R. 2 Ex. 267.

[6] 21 & 22 V. c. 72 ("The I Estates Court (Ireland) Act, § 85, Ir. See Power *v.* Reeve 10 H. L. Cas. 645 (H. L.); Tottenham's Estate, 1867, Ir Eq. 528.

[7] 21 & 22 V. c. 72, § 51, Ir ling *v.* Welch, 1871, Ir. R. 6 C.

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d without objection, the acceptor is presumed to have to its terms, and is bound by the contents, whether he has n fact read the document.[1] Exceptions to this rule exist, r—1st, where from the nature of the transaction the accepting the document may reasonably suppose that it s no special terms; 2nd, where the terms are printed in e calculated to mislead; and 3rd, where the terms or ons are in themselves unreasonable or irrelevant.[1]

[2] Another conclusive presumption made by the law, is that ur of the due execution of *ancient deeds and wills*. When nstruments are thirty years old, and are unblemished by erations, they (as it is said) prove themselves;[3] their bare tion is sufficient, and the subscribing witnesses are conclu- aken to be dead. This presumption,—so far as the present evidence is concerned,—is not affected by proof that the es are living,[4] and, it seems, even actually in court;[5] nor, case of wills, by showing that the testator died within the years.[6] But it must appear that the instrument comes ustody, which (even though it is not in point of law strictly affords a reasonable presumption in favour of its genuine- and that it is otherwise free from just ground of suspicion.[8] t altogether clear whether, if the deed be a conveyance of ate, the party is bound first to show some acts of posses- nder it; but the weight of opinion seems to be in the e, as will hereafter be more fully explained.[9] It also is nable whether the rule applies to an instrument bearing l of a court or a corporation; "because, although the

kins *v.* Rymill, 1883, 10 Q. 8; and cases there cited.

Ev. § 21, in great part. ere, however, a deed more irty years old purported to ppointment under a special and to be executed by the of the donee of the power, h the execution of it by the as such was presumed, the efused to presume that the was duly authorised to the power. In re Airey, Ch. 164 (Kekewich, J.).

v. Burdett, 1836, 4 A. & E.

[5] Per Yates, J., in Marsh *v.* Collnett, 1798, 2 Esp. 666.

[6] Doe *v.* Wolley, 1828, 8 B. & C. 22. In Jackson *v.* Blanshan, 1808, 3 Johns. 292 (Am.), the Sup. Ct. of New York held that the thirty years must be computed from the testator's death.

[7] Doe *v.* Samples, 1838, 8 A. & E. 151; Bishop of Meath *v.* M. of Winchester, 1836, 3 Bing. N. C. 198.

[8] Roe *v.* Rawlings, 1815, 7 East, 291.

[9] See Malcolmson *v.* O'Dea, 1862, 10 H. L. Cas. 593 (H. L.), cited post, §§ 665, 666.

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§§ 87—89.

witnesses to a private deed, or persons acquainted with a p seal, may be supposed to be dead, or not capable of accounted for after such a lapse of time, yet the seals of and corporations, being of a permanent character, may be by persons at any distance of time from the date of the i ment to which they are affixed."[1]

§ 88. The presumption in their favour, if they come fr proper custody, and purport to be thirty years old, is not co to deeds and wills, but extends equally to *letters*,[2] *e receipts*,[4] *settlement certificates*,[5] *and indeed to all other documents;* and in such cases the signatures and handw need not be proved. The rule is founded "on the great diff nay, impossibility, of proving the handwriting of the party such a lapse of time."[6]

§ 89.[7] *Estoppels* may be ranked among the class of irrebu presumptions.[8] A man is estopped, when he has done o mitted some act, which the law will not allow him to ga "The law of estoppel is not so unjust or absurd, as it has too much the custom to represent."[9] Its foundation rests on the obligation to speak and act in accordance with trut which every honest man is bound, and partly on the pol the law, which thus seeks to prevent the mischiefs that inevitably result from uncertainty, confusion, and want o fidence, were men permitted to deny what they had delibe asserted. Therefore every admission which has been made the intention of being acted upon, and which has been acted by another person, is conclusive against the party making all cases between him and the individual whose conduct h thus influenced.[10] The doctrine of estoppel is, however, gu with great strictness, or, as it is said, "estoppels are odi

[1] R. *v.* Bathwick, 1832, 2 B. & Ad. 648.

[2] Doe *v.* Beynon, 1840, 12 A. & E. 431; Bere *v.* Ward, 1821, 2 Ph. Ev. 246; and 1823.

[3] Per cur. in Wynne *v.* Tyrwhitt, 1833, 4 B. & Ad. 376.

[4] Bertie *v.* Beaumont, 1816, 2 Price, 308.

[5] R. *v.* Ryton, 1792, 2 T. R. 259; R. *v.* Netherthong, 1813, 2 M. & S. 337. In these cases no proof custody was given in evidenc the court held this to be imma

[6] Wynne *v.* Tyrwhitt, 1833,

[7] Gr. Ev. § 22, in part.

[8] By the N. York Civ. § 1792, estoppels are abolished.

[9] Per Taunton, J., in Bown Taylor, 1834, 4 N. & M. 264.

[10] Pickard *v.* Sears, 1837, 6 A 174. See also post, § 839.

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on for this is not because the party enforcing the estoppel ned to be desirous of excluding the truth; indeed, the sonable supposition is that that which the opposite party dy solemnly admitted to be so really is the truth; but the estoppel *may* exclude the truth. It consequently is that all estoppels must be certain to every intent; for no l be prevented from setting up the truth, unless it be in ntradiction to allegations and acts previously made in est.[1]

From these last words it will be gathered that a man is not only by his own allegations and acts, but also by *all persons through whom he claims.*[2] In technical e, *estoppels* are usually *binding upon both parties and* Lord Coke divides privies into three classes; first, privies , as heirs; secondly, privies by estate, as feoffees, lessees, s, &c.; and thirdly, privies in law, "as the lord by escheat, nt by the courtesy, the tenant in dower, the incumbent nefice,"[4] husbands suing or defending in right of their executors and administrators.[6] Upon the principle *qui mmodum, sentire debet et onus*, the privy stands in no osition than the party through whom he derives his title; he latter is not at liberty to contradict what he has said or done, the former is subject to a like disability.[7] ption to this rule is admitted in favour of those privies, uld themselves be aggrieved or defrauded by the conduct arty through whom they claim. For instance, where a cutes a deed with the fraudulent intent of defeating the of mortmain, his heir-at-law is not estopped from ing the validity of the indenture, since his claim to ds is founded, not on the deed, but on his title by

nan *v.* Taylor, 1835, 4 N. ; Lainson *v.* Tremere, 1834, E. 792; Kepp *v.* Wiggett, L. J. C. P. 49; Pelletreau on, 1833, 11 Wend. 117 arver *v.* Jackson, 1830, 4 Am.).
P. 233.
ost, §§ 787—793, as to ad- by privies.

[4] Co. Litt. 352 *a*.
[5] Outram *v.* Morewood, 1814, 3 East, 346.
[6] R. *v.* Hebden, 1738, Andr. 389.
[7] Taylor *v.* Needham, 1811, 2 Taunt. 278.
[8] Doe *v.* Lloyd, 1839, 5 Bing. N. C. 741. See Smyth *v.* Wilson, 1841, 2 Jebb & Sy. 660 (Ir.).

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§§ **91, 92.** § 91. There are three classes of estoppels; namely, est by matter of record, estoppels by deed, and estoppels *in* Judgments[2] are the most extensive species of record consequently estoppels by record will be most conve discussed in treating of judgments. Neither an estop record nor one by deed will operate as a *conclusive* es unless the matter of estoppel appears on the record,[3] nor it has been *expressly pleaded* by way of estoppel whe opportunity of so pleading it has been afforded.[4] If a having an opportunity of pleading an estoppel, does no himself of it, the court will conclusively presume that intended to waive all benefit derivable from it, and all jury to form their own conclusions from the facts prese them in evidence.[5] If, indeed, no opportunity for pleadi matter of estoppel in bar has arisen, an estoppel by record deed will be binding when offered in evidence;[6] and th also been held to be the law in some of the United States.[7]

§ 92. It has been held that estoppels *in pais* need pleaded in order to make them obligatory. For instanc man represent another as his agent, in order to procure a to contract with him as such, and this person so contra contract binds the principal equally with one made by hi and it has been held that no form of pleading can leave

[1] Co. Litt. 352 *a*; 2 Smith, L. C. 657.

[2] See post, §§ 1667 et seq.

[3] See Robinson *v.* Robinson, 1879, 2 P. Div. 75.

[4] 2 Smith, L. C. 670, 674, and 683. The whole note, from pp. 656 to 726, should be perused. It contains an elaborate exposition of a very difficult branch of the law. See also Trevivan *v.* Lawrence, 1704, 1 Salk. 276; Magrath *v.* Hardy, 1838, 4 Bing. N. C. 782.

[5] Outram *v.* Morewood, 1803, 3 East, 346; Vooght *v.* Winch, 1832, 2 B. & Ald. 662; Doe *v.* Huddart, 1835, 2 C. M. & R. 316; Doe *v.* Seaton, 1835, 2 C. M. & R. 732; Nowlan *v.* Gibson, 1847, 12 Ir. L. R. 5; Matthew *v.* Osborne, 1855, 22 L. J. C. P. 241; Doe *v.* Wright, 1839, 10 A. & E. 763; Magrath *v.* Hardy, 1838, 4 Bing. N. C. 782, as to estoppels by matter of Wilson *v.* Butler, 1838, 4 Bin 748; Bowman *v.* Rostron, A. & E. 295; Young *v.* Ra 1847, 18 L. J. C. P. 193; Ca *v.* Buller, 1841, 8 M. & W Potts *v.* Nixon, 1870, 5 Ir. L. 45, as to estoppels by and Freeman *v.* Cooke, 18 L. J. Ex. 114, as to both k estoppel.

[6] Whittaker *v.* Jackson, H. L. C. 926, but this was fo doubted: see R. *v.* Blakemore 21 L. J. M. C. 60. See R. *v.* ton, 1853, 22 L. J. M. C. 8 Feversham *v.* Emerson, 18 L. J. Ex. 254. See also R. Ord. XIX. 2, 4, and Ord. XX

[7] See Howard *v.* Mitchell 14 Mass. 241 (Am.); Ad Barnes, 1821, 17 Mass. 365 (A

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at large, or enable the jury to treat it as no contract;[1] and ction by indorsee against acceptor on a bill payable to s order, to a plea that the drawer had no authority to , plaintiff, though he might reply the estoppel,[2] would not ed to do so, but he might by his pleading raise the point that the defence disclosed no legal answer to the action.[3] aterial facts upon which a point of law is to be founded however, always be pleaded unless, as in the case cited, e apparent upon the face of the documents set out in the gs.

A party is not, however, estopped by his own deed where make it void by proving that it was executed for a ent, illegal, or immoral purpose. In one case,[4] indeed, a man, in order to give his brother a colourable qualifica- kill game, had conveyed some lands to him, it was held e grantor's widow could not avoid this conveyance in an of ejectment against her by the brother. But although holas Tindal attempted to support this decision as resting fact, that "the defence set up was *inconsistent* with the it can, even on this ground, scarcely be supported. decisions have established that in an action of ejectment grantee of an annuity, to recover premises on which it ured, the grantor may show that the premises were of ue than the annuity, and that the deed, consequently, l enrolment, notwithstanding that he had expressly ted in the deed that the premises were of greater value;[6]

man *v.* Cooke, 1848, 18 114.
erson *v.* Collman, 1843, 11 P. 270.
ifax *v.* Lyle, 1849, 3 Ex.
v. Roberts, 1832, 3 B. & Ald. also Phillpotts *v.* Phillpotts, L. J. C. P. 11.
v. Wiggins, 1837, 3 Bing. 5.
v. Ford, 1835, 4 L. J. K. B. ere a question was raised a covenant, under any cir- ces, is such a declaration as a party from afterwards ; the fact covenanted for, point was left undecided.

In America a party may, in some cases, be estopped by a covenant. Thus a covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant: Terrett *v.* Taylor, 1815, 9 Cranch, 43 (Am.); Jackson *v.* Matsdorf, 1814, 11 Johns. 97 (Am.); Jackson *v.* Wright, 1817, 11 Johns. 193 (Am.); M'Williams *v.* Nisby, 1816, 2 Serg. & R. 515 (Am.); Somes *v.* Skinner, 1825, 3 Pick. 52 (Am.). But a grantor is not estopped by a covenant, that he is seised in fee and has good right to convey: Allen *v.* Sayward, 1828, 5 Greenl. 227 (Am.); for any seisin in fact, though by

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§§ 93, 94. and that where a bond has been given, or a covenant ma
an illegal consideration, the obligor or covenantor may av
instrument by pleading and proving the illegality ;[1] and th
though a legal, but untrue, consideration is stated on the
the deed.[2] Indeed, where both parties to an indenture
know, or have the means of knowing, that it is executed
immoral purpose, or in contravention of a statute, or of
policy, in general neither will be estopped from proving
which render the instrument void ab initio.[3] For altho
party will thus, in certain cases, be enabled tc take adva
of his own wrong,[4] yet this evil is trifling in comparison wi
flagrant evasion of the law, that would result from an op
rule.[5] Neither will a party be estopped by his deed,
executed it while, from duress, infancy, or other cause, h
incapable of making a valid contract, or if he was deceiv
the fraudulent misrepresentations or acts of other parties.[6]

§ 94. The doctrine at one time prevailed[7] that trustees a
for the benefit of the public could never be estopped from disp
the validity of their deeds, because, if they were, the inn
parties, on whose behalf they were acting, might be seri
injured.[7] The doctrine now, however, only holds good in
in which the trustees have, in their dealings with another p
violated a public statute, the contents of which are presum
be known to such party. Therefore, where a bridge Act autho
commissioners to mortgage the tolls, and enacted that the m
gagees should have no preference by reason of priority, it was

wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.

[1] Prole *v.* Wiggins, 1837, 3 Bing. N. C. 235; Collins *v.* Blantern, 1767, 2 Wils. 341; Gas Light and Coke Co. *v.* Turner, 1839, 5 Bing. N. C. 666; affd. in Ex. Ch., 1840; Stratford and Moreton Ry. Co. *v.* Stratton, 1832, 2 B. & Ad. 518; Hill *v.* Manch. Waterw. Co., 1831, 2 B. & Ad. 552; Benyon *v.* Nettlefold, 1850, 20 L. J. Ch. 186; Horton *v.* Westm. Improve. Comrs., 1852, 21 L. J. Ex. 297.

[2] Paxton *v.* Popham, 1814, 9 419.

[3] Id.

[4] Doe *v.* Ford, 1835, 4 L. J. 268; Doe *v.* Howells, 1832, 2 B. 747.

[5] Benyon *v.* Nettlefold, 18 L. J. Ch. 186. See Mallali Hodgson, 1852, 20 L. J. Q. B. Bowes *v.* Foster, 1858, 26 L. J 262; Taylor *v.* Bowers, 18 Q. B. D. 291.

[6] Hayne *v.* Maltby, 1789, 3 438.

[7] Fairtitle *v.* Gilbert, 1787, 2 169; Doe *v.* Hares, 1833, 4 B. 440.

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§§ 94—96.

action of ejectment brought by a mortgagee of the tolls t the commissioners, that the defendants were estopped from up the fact of an earlier mortgage to defeat the legal estate lessor of the plaintiffs.[1]

. Though an estoppel may bind a person acting in one capa- does not necessarily follow that it will have a similar effect he is sustaining a totally different character.[2] For instance, cutor de son tort, who has verbally agreed with the land- deliver up demised premises, but has afterwards taken out of administration, is not concluded from bringing an action tment against the landlord, who has actually obtained sion under the agreement.[3] Where, however, "an heir nt, having only the hope of succession, conveys, during e of his ancestor, an estate, which afterwards descends upon lthough nothing passes at that time, yet, when the inherit- escends upon him, he is estopped to say that he had no t at the time of the grant."[4] The distinction between these ses is, that in the former, the party not estopped was acting benefit of others; in the latter, the party estopped was sui nd acting on his own behalf.

. A deed does not estop a party from disputing the correct- that which is not an essential averment thereon, but is *escription*—such, for instance, as the date of the deed; the ty of land; its nature, whether arable or meadow; and the or these statements are but incidental and collateral, and e supposed not to have received the deliberate attention of rties.[5] In this country, however, if a deed of conveyance tly states in the operative part that the consideration money en received, and the estoppel is properly pleaded,[6] the fact of

v. Horne, 1843, 12 L. J. 1; R. *v.* White, 1843, 4 Q. B. lorton *v.* Westm. Improve. 1852, 21 L. J. Ex. 297. nith, L. C. 667; Robinson's 03, 5 Rep. 32 *b*; Smyth *v.* 1841, 2 Jebb & Sy. 660 (Ir.); *v.* Gt. N. Ry. Co., 1876, 1 D. 599. See Bennett *v.* , 1877, 46 L. J. Ex. 33, 204,

v. Glenn, 1834, 1 A. & E. e also Middleton's case, 1603, 5 Co. Rep. 21; Metters *v.* Brown, 1862, 32 L. J. Ex. 138; Lyons *v.* Mulderry, 1832, Hayes, 530 (Ir.); Kirwan *v.* Gorman, 1846, 9 Ir. Eq. R. 154; Johnson *v.* Warwick, 1856, 25 L. J. C. P. 102.

[4] Hayne *v.* Maltby, 1789, 3 T. R. 438.

[5] Com. Dig., Estoppel, A. 2; Yelv. 227, by Metcalfe, n. 1; Doddington's case, 1594, 2 Co. Rep. 33; Shipworth *v.* Green, 1725. 8 Mod. 311.

[6] Potts *v.* Nixon, 1870, 5 Ir. C. L. 45.

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§§ **96, 97.** payment, and the amount paid, are conclusively presumed.[1] Conveyancing and Law of Property Act, 1881,[2] has exp enacted that this (which appears to have been so long befo Act) shall be so in favour of a subsequent innocent purc Under the same Act,[3] the production by a solicitor of a dee a receipt in the body thereof or indorsed upon it for the cons tion is sufficient authority for the payment of the conside to him, although a receipt indorsed upon the deed will not in amount to an estoppel.[4] In America,[5] though the party is est from denying the conveyance, and that it was for a va consideration, the statement in the deed is apparently only facie evidence of the amount paid.[6]

§ 97. Lord Coke's doctrine that "a recital doth not con because it is no direct affirmation,"[7] has been expressly over The law now is[8] thus: "If a distinct statement of a part fact is made in the recital of a bond, or other instrument seal, and a contract is made with reference to that recital unquestionably true, that, as between the parties to that i ment, and in an action upon it, it is not competent for the bound[9] to deny the recital, notwithstanding what Lord Cok on the matter of recital in Coke Littleton, 352 *b*; and a rec

[1] Shelly *v.* Wright, 1737, Willes, 9; Cossens *v.* Cossens, 1737, Willes, 25; Rowntree *v.* Jacob, 1809, 2 Taunt. 141, in which last case there were highly suspicious circumstances tending to show that the consideration money had not in fact been paid; Baker *v.* Dewey, 1823, 1 B. & C. 704; Lampon *v.* Corke, 1822, 5 B. & Ald. 606; Hill *v.* Manch. Waterw. Co., 1832, 2 B. & Ad. 552. See Smith *v.* Battams, 1857, 26 L. J. Ex. 232; also Gresley *v.* Mousley, 1861, 31 L. J. Ch. 537.

[2] 44 & 45 V. c. 41, § 55.

[3] Id. § 56.

[4] Lampon *v.* Corke, 1822, 5 B. & Ald. 606; Straton *v.* Rastall, 1788, 2 T. R. 366.

[5] Gr. Ev. § 26, n., almost verbatim.

[6] The principal cases will be found referred to in the early editions of this Work.

[7] Co. Lit. 352 *b*. As to the effect of recitals in a deed which has been tendered for execution but not executed, see Bulley *v.* Bulley L. R. 9 Ch. 739.

[8] Per Parke, B., in Carpe Buller, 1841, 10 L. J. Ex. 3 to other cases where a reci been held conclusive, see Bow Taylor, 1835, 4 N. & M. 264 *v.* Laming, 1854, 23 L. J. Lainson *v.* Tremere, 1834, 1 792; R. *v.* Stamper, 1841, 1 M. C. 73; Hill *v.* Manch. W Co., 1831, 2 B. & Ad. 552; P *v.* Harris, 1845, 15 L. J. Q. Clarke *v.* Hall, 1889, 24 L. 316. See also Bayley *v.* B 1848, 16 L. J. C. P. 206; Yo Raincock, 1847, 18 L. J. C. Horton *v.* Westm. Improve. 1852, 21 L. J. Ex. 297; and B ford *v.* Beecher, 1855, 5 Ir. 417. But see Lindsay *v.* Wicklow, 1873, Ir. R. 7 Eq. 1

[9] Even though she be a woman, semble, Jones *v.* Fr re Fiddey, 1872, L. R. 7 Ch. 7

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ents not under seal may be such as to be conclusive to
e extent. A strong instance as to a recital in a deed is
a case[1] where, in a bond to secure the payment of rent
lease stated, it was recited that the lease was at a rent
and the defendant was estopped from pleading that it
l. only, and that such amount had been paid. So, where
rticular facts are mentioned in a condition to a bond, as
obligor and his wife should appear, the obligor cannot
at he appeared himself, and deny that he is married, in
n on the bond.[2] All the instances given in Com. Dig.,
l, A. 2, under the head of 'Estoppel by Matter of Writing'
one which relates to a release), are cases of estoppel in
on the instrument in which the admissions are contained.
ontract in the instrument itself a party is assuredly bound,
st fulfil it. But there is no authority to show that a
the instrument would be estopped, in an action by the
rty, not founded on the deed, and *wholly collateral* to it,[3] to
he facts so admitted, though the recitals would certainly
nce; for instance, in another suit, though between the same
where a question should arise whether the plaintiff held
of 170*l.* in the one case, or was married in the other case,
not be held that the recitals in the bond were conclusive
of these facts. Still less could it be so held, if the matter
n the instrument were wholly immaterial to the contract
ontained; as, for instance, suppose an indenture or bond
n an unnecessary description of one of the parties as
of a bankrupt, overseer of the poor, or as filling any other
r, it could not be contended that such statement would be
e on the other party, in any other proceeding between

To make a recital operate as an estoppel, there
en be, first, a distinct statement[4] of some material[5]

on *v.* Tremere, 1834, 1 A. & See Brooke *v.* Haymes, . 6 Eq. 25.
. Abr. 873, c. 25.
East. Ry. Co. *v.* Warton, . J. Ex. 515.
epp *v.* Wiggett, 1851, 20 . 49.
rpenter *v.* Buller, 1841, 10

L. J. Ex. 393, the court were strongly inclined to think that, in a deed relating to an adit, a recital that certain neighbouring lands, through which the adit did not pass, belonged to A. B., was an immaterial matter, which a party to the deed was not estopped from denying. The point, however, was not directly decided, as

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§§ **98, 99.** particular[1] fact; secondly, a contract made with referer such statement;[2] and, thirdly, either an action directly fou on the instrument containing the recital, or one which is br to enforce the rights arising out of such instrument.[3] If requisites are satisfied, the doctrine may, in some case extended to instruments not under seal. In all cases of est by recital, the matter recited requires no proof; since the r is not offered as secondary, but as primary evidence, cannot be controverted, and which forms a muniment of This rule, however, only applies to so much of a deed *actually recited;* and therefore if it becomes necessary to on a part of the recited deed which is not itself recited, recited deed must be produced and proved in the regular w

§ 99. It is a rule in the general doctrine of estoppels, every estoppel must be *reciprocal;* that is, it must bind parties, since a stranger can neither take advantage of an este nor be bound by it.[5] For example, where a party, ho chambers in Lincoln's Inn as tenant-at-will under the benc in a deed, by which he conveyed his interest to A., recited he was seised of them for life, and subsequently surren them to the benchers, who admitted B. as tenant, it was that B. was, as against A., not estopped from denying tha surrenderor was seised for life;[6] again, where a man took from the assignees of a bankrupt, by a deed describing such as freehold, he was held not estopped, as against the bank wife (on a claim by her of dower), from proving that the lands in fact leasehold;[7] and where a man purchased property fr

the admission was held inconclusive on other grounds.

[1] As to the distinction between generality and particularity, see Com. Dig., Estoppel, A. 2, and notes to Rainsford *v.* Smyth, 1561, Dyer, 196 *a*.

[2] In Stronghill *v.* Buck, 1850, 14 Q. B. 787, the court thus stated the law:—"Where a recital is intended to be a statement, which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party, and the intent to be gathered from construi instrument." See, also, Yo Raincock, 1847, 18 L. J. C. I Blackhall *v.* Gibson, 1878, 2 R. 49.

[3] Wiles *v.* Woodward, 18 L. J. Ex. 261; Carter *v.* Carter 27 L. J. Ch. 74; Fraser *v.* I bury, 1862, 31 L. J. C. P. 1.

[4] Abbott *v.* Gillett, 1838.

[5] Co. Lit. 352 *a*.

[6] Doe *v.* Errington, 1840, 6 N. C. 79.

[7] Gaunt *v.* Wainman, 1836, N. C. 69.

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§§ 99, 100.

who in the conveyance was erroneously recited to have her title from someone who never had the legal estate, cessors in title were held not to be estopped from denying th of the recital as against a third person to whom the a prior legal owner had purported to convey it;[1] in an gainst an individual for using a way,[2] plaintiff's convic- a previous indictment, in respect of the same way, for ting a public highway, though doubtless strong evidence, be used as an estoppel; while the grantee or lessee under poll if he claim title under it (although not, in general, d from gainsaying anything mentioned in the deed is the deed of the grantor or lessor only) is thereby d from denying title of the grantor;[3] and this is so the grantor had in fact no right to convey, if the grantor rds acquires a good title by possession against the true thus, where a grantor who had in fact no title purported ey by deed a piece of land to A. for life with remainders d A. entered under the deed and afterwards acquired a le by possession, he and his privies were held to be d as against the remaindermen from disputing the of the deed.[4] As against the grantor under a deed poll ption to the general rule requiring reciprocity in estoppels erhaps be recognised, because in these instruments only y is ever intended to be bound, and as he has executed with the same solemnities as an indenture, there is no eason why the doctrine of estoppel should not apply to

. Another rule with respect to estoppels by deed is that which can take effect *by interest* shall not be construed to ct by estoppel.[6] Therefore if a lessor has any interest demised premises, even though it be one less than he s to grant, the lease shall not work by estoppel, but shall the extent of the lessor's interest, and no further.[7] If,

lad Asphalte Co. *v.* Coryat, C. 587 (P. C.).
e *v.* Nuttall, 1855, 25 L. J. it. 363 *b*; Goddard's case, o. Rep. 44.
n *v.* Fitzgerald, [1897] 2 Ch. 86 (C. A.).
[5] 2 Smith. L. C. 660; Bac. Abr. tit. Leases, O.
[6] Doe *v.* Barton, 1840, 11 A. & E. 311.
[7] Id. in argument; Co. Lit. 45 *a*, 47 *b*; Doe *v.* Seaton, 1835, 2 Cr.

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§§ 100, 101. however, a person, having no title whatever, makes a lease indenture, this will estop the parties to the deed from allegi the lessor's want of title during the continuance of the lea and if the lessor subsequently purchases the land, or otherw obtains an interest in it, the lease, which was originally a le by *estoppel*, will be converted into a lease *in interest*, and the h or assignee of the lessor will be bound thereby, as well as t lessee and his assignees.[1]

§ 101. The third kind of estoppels are estoppels by *matter pais*.[2] The most ordinary instance of these is the well-establish rule, that a tenant, during his possession of premises, shall n deny that a landlord, under whom he entered, or from whom has taken a renewal of his holding,[3] or to whom he has p rent, had title at such time.[4] Neither in an ejectment by t landlord, nor in an action by him for rent or for use and occu tion, can the tenant set up the superior title of a third perso or that the landlord has no title. For instance, if the plain be an incumbent, the tenant cannot give evidence that presentation was simoniacal;[6] if he be a devisee he will not allowed to prove that the devisor was incapable of making will[7] (unless, indeed, the party claiming as devisee was guilty fraud in making the will, and in falsely representing it to him a valid one).[8] The only course which a tenant who wishes dispute the title of the landlord under whom he entered c pursue (save indeed in the one case of his being able to sh that his admission of being tenant was obtained by a cl fraud) is to yield up the premises, and then bring an action recover them.[9] So strict is this rule, that, even if a landlord, proving his own case, disclose the fact that he has only

M. & R. 732; Walton *v.* Waterhouse, 1672, 3 Wms. Saund. 417 *a*.

[1] Webb *v.* Austin, 1844, 13 L. J. C. P. 203; Sturgeon *v.* Wingfield, 1846, 15 L. J. Ex. 212.

[2] As to "judicial admissions," and "admissions acted upon," which sometimes are classed among estoppels in pais, see post, §§ 772, 783, 820 et seq., 839 et seq.

[3] Doe *v.* Wiggins, 1843, 4 Q. B. 367, 375.

[4] Doe *v.* Pegge, 1787, 1 T. R. 760; Doe *v.* Barton, 1840, 11 A. & E. See Att.-Gen. *v.* Stephens, 1855, L. J. Ch. 888.

[5] Doe *v.* Pegge, 1787, 1 T. R. 7

[6] Cooke *v.* Loxley, 1792, 5 T. R

[7] Doe *v.* Wiggins, 1843, 4 Q. 367.

[8] Per Ld. Denman, in Id.

[9] Per Coleridge, J., in Id. 3 Doe *v.* Lady Smythe, 1815, 4 M S. 348. See R. S. C. 1883, Ord. XV r. 2; App. C. § 7.

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§§ 101, 102.

e or a joint estate in the premises, the tenant cannot imself of that circumstance as a defence.[1] Further s of the rule are, that a lessee, who has once accepted a d paid rent under it, cannot dispute the lessor's title, the deed itself admits upon its face some infirmity in le,[2] and that a tenant who has held premises under a ion aggregate, and paid rent, cannot object to such ion suing him for use and occupation, on the ground orporation cannot demise except by deed, and that he has l without deed.[3] The rule that a tenant cannot deny his 's title is applicable in an action of trespass, as well as o recover land;[4] and is binding, not only on the tenant but on all who claim in any way through him,[5] as, for , a party to whom a lessee has given up possession.[6] Its e, moreover, extends to the case of a person coming in by ion as a mere lodger, a servant, or other licensee.[7]

. But though a tenant cannot deny that the person, by e was let into possession, had title at the time when he im in, he may show that such person had no title at evious time. For instance, where the defendant claimed conveyance from a certain company, dated in 1824, he owed to dispute the title of the company to convey the remises to the plaintiff in 1818;[8] a lessee let into on in 1826 under a demise from a tenant for life was in an action brought by the reversioner (though he ot have been permitted to show after the death of the

v. Iles, 1840, 11 A. & E.

v. Ashby, 1862, 31 L. J. Morton v. Woods, 1868, . B. 658; 4 Q. B. 293. r of Stafford v. Till, 1829, 4 Dean and Ch. of Rochester 1808, 1 Camp. 466; recog- Fishmongers' Co. v. Robert- 12 L. J. C. P. 185. See Commis. v. Merral, 1869, x. 162; also post, § 984. ey v. Fox, 1857, 26 L. J. ; qualifying a dictum of C.B., in Watson v. Lane, L. J. Ex. 101. See also Ryan, 1875, 10 Ir. R. C. L.

[5] Lond. & N. West. Ry. Co. v. West, 1867, L. R. 2 C. P. 553.

[6] Doe v. Mills, 1835, 2 A. & E. 17; Doe v. Lady Smythe, 1817, 4 M. & S. 348; Taylor v. Needham, 1809, 2 Taunt. 278.

[7] Doe v. Baytup, 1835, 3 A. & E. 188, where a woman who had asked leave to get vegetables in the garden, and obtained the keys for this purpose, fraudulently took possession of the house, and tried (unsuccessfully, of course) to set up a title. See also Doe v. Birchmore, 1839, 9 A. & E. 662.

[8] Doe v. Powell, 1834, 1 A. & E. 531.

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§§ 102, 103. tenant for life adverse title in another *at the date* of the leas to prove that, *before* 1826, the legal estate was outstanding i third party, and that, consequently, the reversioner, who clain in common with the tenant for life under a settlement of a mu earlier date, had no legal title.[1] A tenant is also allowed prove that, since the commencement of the tenancy, the title his lessor has expired or been defeated.[2] For example, he m prove that his landlord was a tenant pour autre vie, and that cestui que vie is dead; or that he was a tenant from year to y or at will, and that the superior landlord had given him a no to quit or determined the will;[3] or that the person who let h in was a mortgagor in possession, who, not having up to date of demise been treated as a trespasser, had then title confer the legal possession, but has subsequently been treated a trespasser.[4] In short, the tenant may rely on any fact wh either amounts to an eviction by title paramount,[5] or shows t the title of his landlord has expired.[6]

§ 103. It is not always clear what constitutes a "letting i possession." Where a party was in possession of premises with leave obtained from any one, and a person came to him and s "You have no right to the premises," upon which he acquiesc and took a lease from this person, the relation of landlord tenant was held to be sufficiently created to debar the one fr disputing the title of the other.[7] But where a tenant, already

[1] Doe *v.* Langdon, 1848, 1 8 L. J. Q. B. 17; Doe *v.* Whitroe, 1822, D. & R. N. P. C. 1.

[2] Doe *v.* Barton, 1840, 11 A. & E. 311; Hopcraft *v.* Keys, 1833, 9 Bing. 613. See Bayley *v.* Bradley, 1847, 16 L. J. C. P. 206; Watson *v.* Lane, 1856, 25 L. J. Ex. 101; Langford *v.* Selmes, 1857; Howe *v.* Scarrott, 1859; Lond. & N. West. Ry. Co. *v.* West, 1867.

[3] Doe *v.* Barton, 1840, 11 A. & E. 311.

[4] Doe *v.* Barton, supra. A mortgagee, by simply giving notice to the tenant to pay rent to him, does not treat the mortgagor as a trespasser: Hickman *v.* Machin, 1859, 28 L. J. Ex. 310; but a notice, to have such an effect, must either be coupled with an attornment, or be followed by actual payment of rent, to the m gagee. See id.; also Wilton *v.* Du 1851, 21 L. J. Q. B. 60; Turne Cameron's Coalbrook St. Coal 1850, 20 L. J. Ex. 71; Litchfiel Ready, 1850, 20 L. J. Ex. 51; T *v.* Hunt, 1853, 22 L. J. Ex. 318.

[5] Gouldsworth *v.* Knights, 1 12 L. J. Ex. 283.

[6] Downs *v.* Cooper, 1841, 11 L Q. B. 2. See Doe *v.* Watson, 1 2 Stark. 230; Doe *v.* Seaton, 1 2 Cr. M. & R. 732; Claridge Mackenzie, 1842, 4 M. & Gr. 1 Mountnoy *v.* Collier, 1853, 22 L Q. B. 124; Emery *v.* Barnett, 185 L. J. C. P. 216; Delmege *v.* Mull 1875, 9 Ir. R. C. L. 209, Ex. Ch.

[7] Doe *v.* Mills, 1835, 2 A. & B. See also Dolby *v.* Iles, 1840, A. & E. 335.

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§§ 103, 103a.

on of premises under a demise from a termor, at the expi-
f the termor's right entered into a parol agreement with
party to hold under him, in ignorance of the real facts,
ler the supposition that this party was entitled to the pre-
his agreement was held not to be equivalent to the first
nto possession.[1] Neither a parol agreement by a tenant
of a party, by whom he was *not let into possession*,[2] nor an
ent,[3] nor an actual payment of rent to such party, even
distress,[4] will in themselves operate as estoppels; but the
nay still show that he has acted in ignorance, or under a
ehension of the real circumstances,[5] or, in the case of
t of rent, that some other party was entitled to receive it.[6]

A. Besides the examples of estoppels by *matter in pais* above
to there exists a large class of cases where parties are
l from denying the truth of representations which they
de, and which have been acted on by others. These will be
to more fully hereafter under the heading "Admissions
on by others."[7] It will suffice to state here the general rule
en A. wilfully makes a representation intending to induce
t on the faith of it (or where, whatever is A.'s intention,
nable man in the situation of B. would believe that it was
l he should act upon it), and B. does act upon it and alters
tion, then A. is estopped from averring against B. that a state
s existed at the time he made the representation different
nat which he represented; and conduct by negligence

dge *v.* Mackenzie, 1842, 4
143. "There was no *new*
n given by the defendant;
in no way prejudiced; she
t have turned the plaintiff
ossession; and before their
nt, if she had brought her
t, the plaintiff might have
at she had no title, and that
was in some one else. It is
he case of a person letting
into possession of vacant
; it is in fact a remaining
ssion of premises, which
formerly occupied by the
Per Tindal, C.J.

v. Brown, 1837, 7 A. & E.

ght *v.* Cox, 1856, 25 L. J.
C. P. 314.

[5] Gregory *v.* Doidge, 1827, 3 Bing. 474; Gravenor *v.* Woodhouse, 1824, 1 Bing. 38; Rogers *v.* Pitcher, 1818, 6 Taunt. 202; Doe *v.* Barton, 1840, 11 A. & E. 311; Hall *v.* Butler, 1839, 10 A. & E. 206.

[6] Cooper *v.* Blandy, 1839, 1 Bing. N. C. 45; Doe *v.* Francis, 1837, 2 M. & Rob. 57; in which case payment of rent being the only evidence of tenancy, Patteson, J., allowed the defendant to show, that the lessor of the plaintiff had acted as the agent of third parties. See Hitchings *v.* Thompson, 1850, 19 L. J. Ex. 146, explained by Ld. Cranworth, C., in Att.-Gen. *v.* Stephens, 1855, 25 L. J. Ch. 888.

[7] Post, § 839 et seq.

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§§ 103a, 104.

or omission, where there is a duty cast upon the person to disclo the truth, may often have the same effect.[1]

§ 104.[2] There are also certain conclusive presumptions of l with respect to *infants*.[3] Thus, an infant under seven is conc sively presumed incapable of committing any felony, or, inde any indictable offence,[4] for want of discretion;[5] a male inf under fourteen is presumed incapable, on the ground of impoten of committing a rape as a principal in the first degree,[6] or of bei guilty, under § 4 of the Criminal Law Amendment Act, 188 of the offence of carnal knowledge of a girl under thirteen,[7] thou he may be convicted of a criminal assault upon her,[9] or of co mitting an assault with intent to perpetrate that crime;[10] a fem under thirteen is presumed incapable of consenting to sex intercourse, and to have carnal knowledge of her is a felon while an attempt to have such knowledge is a misdemeanou and to have, or attempt to have, carnal knowledge of a girl o thirteen and under sixteen is a misdemeanour,[13] and the cons of a girl under thirteen to an act of indecency cannot be set as a defence to a charge of assault.[13] An unmarried girl un eighteen cannot consent to be abducted in order that a man m have carnal knowledge of her, and to abduct such a girl for su

[1] Freeman *v.* Cooke, 1848, 2 Ex. 654; Carr *v.* L. & N. W. Ry., 1875, L. R. 10 C. P. 307; and cases cited post, § 839 et seq.

[2] Gr. Ev. § 28, in part.

[3] In all civil questions where the rights of parents depend on the birth of a living child, the Scotch law conclusively presumes that the child was not born alive, if it was not heard to cry. 1 Dickson, Ev. 180.

[4] 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 10, sub-sect. 5.

[5] 4 Bl. Com. 23; 1 Hale, 27. If an infant under seven is given into custody on a charge of felony, an action for false imprisonment will lie: Marsh *v.* Loader, 1863, 14 C. B. (N.S.) 525.

[6] 1 Hale, 630; 1 Russ. C. & M. 676. This presumption is not affected by 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 48: R. *v.* Groombridge, 1836, 7 C. & P. 582; and it applies to the offence of carnally abusing a girl under statutory age: R. *v.* Jordan, 18 9 C. & P. 118. But if the boy h a mischievous discretion, he may a principal in the second degr 1 Hale, 630. The patient may convicted of an unnatural cri though the agent be under fourte R. *v.* Allen, 1826, 1 Den. C. C. 36

[7] 48 & 49 V. c. 69.

[8] R. *v.* Waite, [1892] 2 Q. B. 6

[9] R. *v.* Williams, [1893] 1 Q. 320.

[10] R. *v.* Eldershow, 1828, 3 C. & 396; R. *v.* Philips, 1837, 8 C. & 736.

[11] See "The Criminal Law Amen ment Act, 1885" (48 & 49 V. c. 6 § 5; and see, also, R. *v.* Beale, 18 L. R. 1 C. C. 10.

[12] See id. § 5.

[13] 43 & 44 V. c. 45 ("The Crimi Law Amendment Act, 1880"), § R. *v.* Roadley, 1880, 49 L. J. M. 88. The last-named case is ov ruled by the above enactment.

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§§ 104, 105.

se is a misdemeanour.[1] An infant of either sex under one is presumed to be so far incapable of managing his airs as not to be able, in general,[2] to alien land, execute a ate an account, to make any binding contract,[4] unless ssaries.[5] He is also incapable of being subjected to a g order made under the Bankruptcy laws;[6] and since the anuary, 1838, such a person cannot make a will, whether rts to dispose of real or of personal estate.[7]

. No rigid presumption is fixed by law as to the exact f life at which the possibility of having issue, without ous agency,[8] becomes in women extinct; but in directing ribution of trust funds, the courts have been in the habit ning that, in general, females, after arriving at the age of ee, are past child-bearing.[9]

49 V. c. 69, § 7.

8 & 19 V. c. 43 ("The Intttlements Act, 1855"), and V. c. 83 (Ir.), enabling male f twenty, and female inseventeen, to make, with robation of the Chancery binding settlements on

Martin *v.* Gale, 1867, 4 28, holding a deed by an harging his reversionary to secure money advanced ssaries voidable and not ble.

38 V. c. 62 ("The Infants' ct, 1874"). As to how far t can act as a trustee, or a power, see King *v.* Bellord, L. J. Ch. 646; also In re Trusts, 1868, Ir. R. 5 Eq. n re D'Angibau, 1880, 15 28, C. A.

. Com. 465, 466; Co. Lit. s to what are necessaries, § 42. As to how far infant lers are liable to actions for Newry & Ennisk. Ry. Co. e, 1849, 18 L. J. Ex. 325; Thirsk Ry. Co. *v.* Fearnley, L. J. Ex. 330; Cork & Ban- Co. *v.* Cazenove, 1847, 10 35; N. West. Ry. Co. *v.* el, 1850, 20 L. J. Ex. 6; ead, Lanc. & Chesh. Junc. *v.* Pilcher, 1850, 19 L. J. Ex. n infant lessee, though not liable on the contract of tenancy, is answerable for the rent during his occupation of the premises. Blake *v.* Concannon, 1870, 4 Ir. R. C. L. 323. But see Lempriere *v.* Lange, 1879, 12 Ch. D. 675.

[6] Re Jones, Ex p. Jones, 1881, 18 Ch. D. 109, C. A.

[7] 7 W. 4 & 1 V. c. 26 ("The Wills Act, 1837"), §§ 7, 34. Before that date, boys of fourteen years, and girls of twelve, might have disposed of personalty by will, if proved to have been of sufficient discretion, 1 Will. on Ex. 14—16.

[8] See Gen., ch. xvii., vv. 15—19; ch. xviii., vv. 9—15; and ch. xxi., vv. 1—7.

[9] Haynes *v.* Haynes, 1866, 35 L. J. Ch. 303; and cases cited in the note. See also Re Widdow's Trusts, 1871, L. R. 11 Eq. 408; and Re Millner's Estate, 1872, L. R. 14 Eq. 245; in which last case a woman married for twenty-six years, and having never had a child, was presumed to be barren at the age of forty-nine years and nine months. But in Croxton *v.* May, 1876, 9 Ch. D. 388, the Court of Appeal refused to regard a woman whose age was fifty-four and a half years, married three years, and never having had a child, past child-bearing. Sed qu., and see Davidson *v.* Kimpton, 1881, 18 Ch. D. 213. The same principles appear to apply both to the cases of

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§§ 106, 107.

§ 106. A conclusive presumption in favour of *legitimacy* exi in certain cases.[1] Thus, where husband and wife have cohabi together, and no impotency is proved, the issue is conclusiv presumed to be legitimate, though the wife is shown to have be at the same time, guilty of infidelity.[2] Even where the pare are living separate, a strong presumption of legitimacy s arises, which can only be rebutted, either by proving a divo a mensâ et thoro, or, since the 11th of January, 1858, a judic separation, or by cogent and almost irresistible proof of n access in a sexual sense;[3] and, indeed, the fact that a marr woman is living in notorious adultery, though amounting to v strong evidence, is not, in itself, sufficient to repel the presun tion of the legitimacy of her offspring;[4] nothing, except evide that the husband did not have intercourse at the period of c ception, can prove to be illegitimate a child born in wedlock. the husband could, from the circumstances of time, place, s health, have had nuptial intercourse with his wife, and there no evidence that he did not have such intercourse, he must considered the father of the child.[5] But where alleged pare have been divorced or judicially separated, children born duri the separation are primâ facie illegitimate.[6]

§ 107.[7] Conclusive presumptions are also known to the *law nations*. For instance, despatches of the enemy which a neut vessel is found carrying between different parts of the enem dominions, are presumed to be hostile,[8] at least, if they have be

spinsters and to the cases of widows who have had children: In re White, [1901] 1 Ch. 570.

[1] See ante, § 16.

[2] Cope *v.* Cope, 1833, 5 C. & P. 604; Morris *v.* Davies, 1827, 3 C. & P. 215; Wright *v.* Holdgate, 1850, 3 C. & K. 158; Legge *v.* Edmonds, 1856, 25 L. J. Ch. 125; Banbury Peer., 1727, H. L., in Appendix, n. B. to Le Marchant's Gardner's Peer.; R. *v.* Luffe, 1807, 8 East, 202. As to the Mahomedan law on this subject, see Ashrufood Dowlah Ahmed *v.* Hyder Hossein Khan, 1866, 11 Moore, Ind. App. 94.

[3] Id.; Bosvile *v.* Attorney-Gen., 1887, 12 P. D. 177; Saye and Sele Peer., 1846. 1 H. L. C. 507; Hargrave *v.* Hargrave, 1846, 9 Beav. 552; Plowes *v.* Bossey, 1862, L. J. Ch. 681; Atchley *v.* Spri 1864, 33 L. J. Ch. 345.

[4] R. *v.* Mansfield, 1841, 1 Q. 444. In this case Ld. Denn questions the authority of Cope Cope, 1833, 5 C. & P. 604. Hawes *v.* Draeger, 1883, 23 Ch. 173.

[5] Gordon *v.* Gordon and Granv Gordon, [1903] P. 141; 72 L. J. 33; 89 L. T. 73 (Jeune, P.).

[6] St. George *v.* St. Marga 1706, 1 Salk. 123; Hetherington Hetherington, 1887, 12 P. D. 1 In such cases, non-access is p sumed.

[7] Gr. Ev. § 31, in part.

[8] The Atalanta, 1808, 6 Ch. R 440.

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§§ 107, 108.

ently concealed; the *spoliation of papers* by a captured party ded, in all the States of Continental Europe, as giving conclusive presumption of guilt. But, in general, in d and America, the presumption of guilt is only primâ d is open to explanation. English and American law re lenient, and do not found on the mere spoliation of an absolute presumption of guilt. But they only stop that result; for a case that escapes with such a brand is saved, as it were, from the fire;[1] and where the case under other circumstances of suspicion, or the surround- umstances establish bad faith or gross prevarication, the ption is, even in English and American law, conclusive.[2] presumption all but conclusive is raised against any hich has been captured while entering a blockaded port; owner can protect the ship from being condemned as rize only by establishing a justification on the ground of ive necessity.[3] It is, moreover, also primâ facie presumed owners of a cargo found on board a ship, which is con- for blockade-running, were privy to the intention of g a blockade, and their only escape from this presump- their being able to prove that, at the time when the t was made, they could not have known that the blockade n imposed.[4]

.[5] In all cases of conclusive presumption, the rule of law ttaches itself to the circumstances when proved; it is uced from them. It is not a rule of inference from testi- ut a rule of protection, which is held to be expedient for ral good. It is not, for example, assumed that all land- ve good titles; but it is held that it will be a public incon- e to suffer tenants to dispute them. Neither is it assumed averments and recitals in deeds and records are true; held that it will be mischievous if parties are permitted them. It is not assumed that all simple contract debts, ears' standing, are paid, nor that every man quietly

Hunter, 1815, 1 Dods. Adm.
Pizarro, 1817, 2 Wheat.
e Hunter, 1815, 1 Dods.
. See post, § 116.

[3] Baltazzi *v.* Ryder, 1858, 12 Moo. P. C. 168.
[4] Id.
[5] Gr. Ev. § 32, almost verbatim.

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§§ 108—111. occupying land twenty years as his own has a valid title by g
but it is deemed expedient that claims opposed by such evi
as the lapse of those periods affords, should not be countena
and that society is more benefited by a refusal to entertain
claims than by suffering them to be made good by proof
fine, the law does not assume the impossibility of things
are possible; but the presumption of law is founded, not on
the possibility of their existence, but on their occasional o
rence; and it is against the mischiefs of their occurrence th
interposes its protecting prohibition.[1]

§§ 109—110.[2] We now come to the *second* of the two cl
into which presumptions of law are divided.[3] This class co
of *disputable presumptions*, and answers to the *præsumptiones*
of the Roman law. Presumptions of this class may alwa
overcome by opposing proof.[4] These disputable presumptio
law are, like *conclusive* presumptions, the result of the ge
experience of a connexion between certain facts or things
one being usually found to be the companion, or the effe
the other. Where disputable presumptions arise, however
connexion is not so intimate, or so uniform, that it can be co
sively presumed to exist in every case; yet it is so general,
the law itself, without the aid of a jury, in the absence
opposing evidence, infers the one fact from the proved existen
the other. In this mode *the law*—even in the absence of any c
sponding allegation in the pleading[5]—defines the nature
amount of the evidence which is sufficient to establish a p
facie case, and to throw the burthen of proof on the other pa
and says that in such cases, if no opposing evidence is offe
the jury are bound to find in favour of the presumption, and
a contrary verdict may be set aside as being against evidenc

§ 111. Disputable presumptions of law differ from
presumptions of fact in three important particulars. In the
place, the judge is bound to explain to the jury whatever l
presumptions arise from the facts proved;[6] next, the jury
bound to give full weight to the presumptions so explained;

[1] See 6 Law Mag. 348, 355, 356.
[2] Gr. Ev. § 33, in great part.
[3] See supra, § 70.
[4] Hein. ad Pand. P. iv. § 124.
[5] R. S. C. 1883, Ord. XIX. r.
cited post, § 368, n.
[6] Ante, § 25.

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§§ 111, 112.

e court alone, without the intervention of the jury, may proper legal inferences whenever the requisite facts loped in the pleadings.[1] In practice, however, the n between presumptions of law and presumptions of y no means well defined, and the line of demarcation, n visible at all, is often overlooked.[2] A presumption regarded by some judges as one of law is treated by s one of fact; nay, the same judges place the same tion at different times in different classes. The following principally apply to disputable presumptions of law, but be occasionally found to extend to cogent presumptions

One of the most important of disputable legal presumpthat of *innocence*. This, in legal phraseology, "gives it of a doubt to the accused," and is so cogent, that it e repelled by any evidence short of what is sufficient to the fact of criminality with moral certainty.[3] In civil when no violation of the law is in question, and no esumption operates in favour of either party, the rance of probability, due regard being had to the of proof, may constitute sufficient ground for a verdict.[4] n any person the stigma of crime requires, however, a egree of assurance; and juries will not be justified in ch a step, except on evidence which excludes from their reasonable doubt.[5] It has sometimes been said, that mption in question is confined to the criminal courts, opted there specially in favour of life and liberty, and guard against error in convictions which are not open to

But it rests on a broader basis. The right which n has to his character, the value of that character to and his family, and the evil consequences that would society if charges of guilt were lightly entertained, or established in courts of justice:—these are the real

Ev. 404, 405.
4.
. 817, 865, 4th ed.; 1 Gr. *a*; R. *v.* White, 1865, 4 3.
. 818, 4th ed.; 1 Gr. Ev. Best, Ev. 120; Cooper *v.* Slade, 1858, H. L. (Willes, J.), 27 L. J. Q. B. 449, 455.
[5] St. Ev. 817, 865, 4th ed.; Best, Ev. 120.
[6] Magee *v.* Mark, 1861, 11 Ir. C. L. 449; Best, Ev. 120; 1 Gr. Ev. § 13 *a*.

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§§ 112, 113. considerations which have led to the adoption of the rule tha imputations of crime must be strictly proved. The rule, acc ingly, is recognised alike by all tribunals, whether civil criminal, and in all proceedings, whether the question of gui directly or incidentally raised.[1] For example, in an ac against an insurance company to recover a loss by fire, where the defence is that the plaintiff wilfully burnt down premises, the jury, before finding a verdict against the plai must be satisfied that the act imputed to him has been pr by clear evidence, so clear as to justify a conviction for ars and, in general, whether the question arises in a prosecutio it, or in a civil court, forgery or bigamy must similarl established by the same strict evidence.[3] In accordance this principle, it has been held in America that in a civil a on a policy of insurance a death must be presumed to have a natural one, and not a suicide, when there is no evidence its cause, since suicide is felony.[4]

§ 113.[5] So strong is the presumption of *innocence*, that where guilt can be established only by proving a negative, negative must, in most cases (unless indeed a special statut applicable,[5] as in § 14 of the Summary Jurisdiction Act, 18 be proved, though as a general rule the burden of proof lie the party alleging the affirmative. For instance, a plaintiff complained that the charterer of a ship had put on boar article highly inflammable and dangerous, *without giving noti* its nature to the master in charge, was held bound to prove negative averment.[7]

[1] Best, Ev. 447.

[2] Thurtell *v.* Beaumont, 1823, 1 Bing. 339.

[3] Chalmers *v.* Shackell, 1834, 6 C. & P. 475; Willmett *v.* Harmer, 1839, 8 C. & P. 695. See, also, Neeley *v.* Lock, 1838, 8 C. & P. 532; Magee *v.* Mark, 1860, 11 Ir. C. L. 449.

[4] Walcott *v.* American Life, &c., Soc., 1891, 33 Am. St. R. 923 (Am.).

[5] Gr. Ev. § 35, in part.

[6] 11 & 12 V. c. 43, which contains the following provision: "Provided always that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the st on which the same shall be fra it shall not be necessary fo prosecutor or complainant in behalf to prove such negative, bu defendant may prove the affirm thereof in his defence if he w have the advantage of the sa A similar provision is contain § 39, sub-sect. 2, of the Sum Jurisdiction Act, 1879 (42 & 4 c. 49. See also post, § 372.

[7] Williams *v.* E. Ind. Co., 3 East, 192. So of allegations a party had not taken the Sacra R. *v.* Hawkins, 1808, 10 East, or had not complied with the A

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§ 114.

[1] Questions of nicety arise where the presumption of
e is met by some counter-presumption.[2] For example,
woman, twelve months after her husband (a soldier on
ervice) was last heard of, married a second husband, on a
as to the settlement of the children by the second husband,
eld that it might be presumed that the first husband was
he time of the second marriage, though the presumption
ntinuance of life would have prevailed had it not been
l by the stronger legal presumption of innocence;[3] and
l for bigamy of a woman who had married again only
rs after separating from her first husband, it was held
law could not presume the continuance of the first hus-
fe, but that it was a question of fact for the jury whether
alive or dead at the date of the second marriage;[4] but
letter was proved to have been written by a wife from
man's Land, dated only twenty-five days prior to second
e, it was held that it might be presumed that the husband
guilty of bigamy;[5] upon a charge of bigamy any person
g a second time whose husband or wife shall have been
lly absent from such person for the space of seven years
past and shall not have been known by such person to
g within that time, is entitled to presume the death of
son in answer to the charge;[6] and when it appears that
on's death has been occasioned by the hand of another,
a presumption that the killing amounts to murder, and it
the person charged with the offence to show by evidence,
erence from the circumstances of the case, that the offence
itigated character:[7] it seems however doubtful whether

y, &c.: Powell *v.* Milburn, Vils. 355; or that goods legally imported: Sissons 1826, 5 B. & C. 758; or atre was not duly licensed: . Redge, 1824, 1 C. & P. post, § 371.
v. § 35, in part.
iddleton *v.* Barned, 1849, Ex. 433; R. *v.* Bjornsen, . J. M. C. 180.
Twyning, 1819, 2 B. & Ald.
e R. *v.* Jones, 1883, 52 C. 96.
Lumley, 1869, L. R. 1 C. C. R. 196; R. *v.* Willshire, 1881, 6 Q. B. D. 366. See further, R. *v.* Jones, 1868, 11 Cox, C. C. 358; and see, as to the presumption of life, §§ 198—203, post.

[5] R. *v.* Harborne, 1835, 2 A. & E. 540; R. *v.* Mansfield, 1841, 1 Q. B. 444. See, also, Lapsley *v.* Grierson, 1848, 1 H. L. C. 498; and the Breadalbane case, 1866, L. R. 1 H. L. (Sc.) 182, cited post, § 172.

[6] 24 & 25 V. c. 100, § 57.

[7] R. *v.* Greenacre, 1837, 8 Car. & P. 35 (Tindal, C.J.).

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§§ 114, 115. to raise this presumption it must not be first shown that killing was wilful or criminal; and in Ireland on an indictm for manslaughter by driving a cab over a woman the fact the woman had been killed was in itself regarded as suffic primâ facie evidence of negligence to rebut the presumptio innocence, and to place upon the driver the burthen of pro that he had exercised due care.[1]

§ 115. An exception to the rule that innocence is to be presu on principles of public policy exists in some cases of agency, in criminal and civil cases.[2] Thus, a contract baker ma convicted of selling unwholesome bread, if it appear that he allowed his foreman to use alum, though not in such quant as to render the bread unwholesome, but that the servant introduced alum to a deleterious extent;[3] by the Pawnbro Act, 1872, "anything done or omitted by the servant, appren or agent of a pawnbroker, in the course of or in relation to business," shall be deemed to be done or omitted by the pa broker;[4] the directors of a gas company are criminally answe for an act done by their superintendent and engineer, und general authority to manage the works, though perso ignorant of the particular plan adopted, and though such was a departure from the original and understood method, w the directors had no reason to suppose was discontinued;[5] and sale of a libel[6] in a bookseller's shop by his servant in the ordi course of his employment, is evidence of a guilty publicatio the master. But this presumption is never *conclusive* agains

[1] R. *v.* Cavendish, 1873, Ir. R. 8 C. L. 178. Sed qu. this case, which seems opposed to the decisions in civil cases that the mere happening of an accident is not sufficient evidence of negligence to be left to a jury: see Hammick *v.* White, 1862, 11 C. B. (N.S.) 588; Manzoni *v.* Douglas, 1880, 6 Q. B. D. 145; unless the action is of such a nature that negligence may be presumed from the mere fact of the accident, as to which see cases cited post, § 188.

[2] See post, §§ 905, 906. See, also, Cooper *v.* Slade, 1857, 27 L. J. Q. B. 449, H. L.

[3] R. *v.* Dickson, 1814, 4 C 12. See Att.-Gen. *v.* Riddle, 2 C. & J. 493; and Searle *v.* nolds, 1866, 7 B. & S. 704.

[4] 35 & 36 V. c. 93, § 8.

[5] R. *v.* Medley, 1834, 6 C. 292. See, also, R. *v.* Stephens, L. R. 1 Q. B. 702; Mullins *v.* Co 1874, L. R. 9 Q. B. 292; *v.* De Vitré, 1868, L. R. 3 Ch. and Dickinson *v.* Fletcher, L. R. 9 C. P. 1; Somerset *v.* 1884, 12 Q. B. D. 360; distingu Bond *v.* Evans, 1888, 21 Q. 249.

[6] Gr. Ev. § 36, in part.

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§§ 115—116.

Indeed, on indictments for libel, it is especially provided e master, under a plea of "not guilty," may prove publication was in fact made "without his authority, , or knowledge," and that there was "no want of care or on his part."[1] Similar principles apply not only to ers of newspapers,[2] but to owners of alkali works.[3]

A. In spite of the usual presumption of innocence, it must, presumed on a prosecution under the Prevention of Cruelty ldren Act, 1904, and the enactments mentioned in the first le thereto, that the child, who is the subject of the charge, e age which it is charged as being and apparently is.[4]

.[5] Moreover, the presumption of innocence may be over- and a *presumption of guilt* be raised, by the misconduct of ty in suppressing or *destroying evidence*, which he ought to , or to which the other party is entitled.[6] For example, liation of papers, material to show the neutral character sel, furnishes (as before pointed out[7]) a strong presumption, *n spoliatoris*, against the ship's neutrality ;[8] if any person d a vessel, which is being chased by an officer of the pre- service, throw overboard, stave, or destroy any part of the the vessel is forfeited, because such conduct raises an irresistible presumption that the freight so made away s legally liable to seizure ;[9] the concealment on board a f any goods liable to duty, justifies the inference that the

V. c. 96 ("The Libel Act, § 7. As to the law before see 1 Russ. C. & M. 595; R. , 1829, Moo. & M. 433; *v.* Greening, 1817, 8 Taunt. *v.* Almon, 1770, 5 Burr.

ss. C. & M. 595; 6 & 7 V. he Libel Act, 1843"), § 7; brook, 1878, 3 Q. B. D. 60; l trial, 1878, 4 Q. B. D. 42; sey, 1883, 15 Cox, C. C. 231. 45 V. c. 37 ("The Alkali, ks Regulation Act, 1881"), nded by 55 & 56 V. c. 30. w. 7, c. 15, § 17. For other tatutory presumptions, see 374, n., post.

Ev. § 37, in great part. instance, formerly, by 21 27 (probably copied from a similar edict of Hen. II. of France, cited by Domat), the mother of an illegitimate child who endeavoured privately, either by drowning, or secret burying, or by any other way, to conceal its death, was presumed to have murdered it, unless she could prove by one witness at the least that the child was born dead. This barbarous rule is now rescinded both in England and America. See, as to present English law, 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 60.

[7] Supra, § 107.

[8] The Hunter, 1815, 1 Dods. Adm. 480; The Pizarro, 1827, 2 Wheat. 227.

[9] See 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 180.

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§ 116. owner intended to defraud the customs, and such goods accordingly be forfeited ;[1] but if a man find goods which are and keep them it is no larceny unless the jury are sati that the finder believed that the owner could be found presumption that they are adverse to him is raised against a p who, having obtained possession of papers from a witness, the service of a subpœna duces tecum upon the latter, withh them at the trial.[3] Indeed, the general rule is "*omnia præsumu contra spoliatorem*,"[4] whose conduct is attributed to a supp consciousness that the truth would operate against him. T to take a familiar example, where the finder of a jewel would produce it, the jury, under the judge's direction, presumed ag him that it was of the highest value of its kind ;[5] but wh plaintiff, who had bought a bicycle from the defendants, injured by the top of the steering post breaking and cla damages for breach of warranty of fitness, and after the acci had the broken parts examined by experts and then sen bicycle to the defendants for inspection, and the defend replaced the broken parts and threw the broken pieces a which accordingly were not produced at the trial, it was that the loss and non-production of the broken pieces by defendants did not under the circumstances, the plaintiff's ex having seen the pieces, make the defendants *spoliatores* ag whom *omnia præsumuntur* or shift the burden of proof.[6] I action for goods sold against a defendant who has been guil no fraud or improper conduct, in the absence of evidence o quality of the goods which were delivered, the presumpti that such goods were goods of the cheapest description.[7]

[1] See 39 & 40 V. c. 36, § 177.

[2] R. *v.* Knight, 1871, 12 Cox, 102 (C. C. R.) ; R. *v.* Thurborn, 1849, 18 L. J. M. C. 140.

[3] Leeds *v.* Cook, 1803, 4 Esp. 256.

[4] 2 Poth. Obl. 292; Dalston *v.* Coatsworth, 1721, 1 P. Wms. 731; Cowper *v.* Ld. Cowper, 1734, 2 P. Wms. 720; R. *v.* Arundel, 1721, Hob. 109; D. of Newcastle *v.* Kinderley, 1803, 8 Ves. 363; Gray *v.* Haig, 1855, 20 Beav. 219; Annesley *v.* E. of Anglesea, 1743, 17 How. St. Tr. 1430. See, also, Sir S. Romilly's argument in Ld. Mel case, 1806, 29 How. St. Tr. Anon., 1698, 1 Ld. Raym. 731 Baker *v.* Ray, 1826, 2 Russ. 7 L. C. thought that this rule h some cases been pressed a litt far.

[5] Armory *v.* Delamirie, 17 Str. 505.

[6] Williamson *v.* Rover Cycl 1901, 2 Ir. R. 615 (C. A. Ir.) (P C.B., diss.).

[7] Clunnes *v.* Pezzey, 18 Camp. 8.

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§§ 117, 118.

.[1] But the mere *fabrication* of evidence does not of itself any presumption *of law* against the innocence of the party, matter to be dealt with by the jury. Innocent persons, he influence of terror, have sometimes been led to the ion of exculpatory facts, of which there are several es in the books.[2] Moreover, the exercise by a client of oubted right to prevent his solicitor from disclosing con- l communications forms no just ground for adverse ption against him.[3] The non-production of deeds or after notice, has, in general, only the effect of admitting er party to prove their contents by parol,[4] and, as against y refusing to produce them, to raise a primâ facie pre- on that they have been properly stamped.[5] Nevertheless, nduct is, in the absence of excuse, calculated to produce prejudicial effect in the minds of the jury against the naving recourse to it;[6] and if the production of his papers establish the guilt or innocence of a person charged with misconduct, the jury will be amply justified in presum- guilty from the unexplained fact of their non-production.[7] jurors will always do well to regard with suspicion the of a party, who, having it in his power to produce cogent e in support of his case, offers testimony of a weaker and sfactory character.[8]

.[9] Though the general presumption of law is in favour of ce, yet, as men seldom do unlawful acts with innocent ns, the law presumes that every act, which in itself is l, has been wrongfully intended, till the contrary appears.[10]

v. § 37, as to first six lines. Inst. 232; Wils. Circ. Ev.

worth *v.* Lloyd, 1864, 33 688, H. L.

er *v.* Gibbons, 1813, 3 3.

v. Anderson, 1815, 1 . See § 148, post.

Roe *v.* Harvey, 1769, 4 Burr.

te *v.* Kinsey, 1835, 1 C. M. Sutton *v.* Devonport, 1858, . P. 54; Edmonds *v.* Foster, L. J. C. P. 41.

n *v.* U. S., 1846, 45 U. S.

[8] See N. Y. Civ. Code, § 1852, arts. 6 and 7.

[9] Gr. Ev. § 34, as to first seven lines.

[10] "Where an act, in itself *indifferent*, if done with a particular intent becomes criminal, there the intent must be proved and found: R. *v.* Drewett, 1905, 69 J. P. 37; but where the act is in itself *unlawful*, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." R. *v.* Woodfall 1770, 5 Burr. 2661. See also R. *v.* Harvey, 1823, 2 B. &

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§ 118. Thus, on a charge of murder, malice is presumed from the fa of killing, unaccompanied by circumstances of extenuatio and the burthen of disproving the malice is thrown upon t accused;[1] and if an unauthorised party, to raise money, puts t name of another person to a bill, a felonious intent will be pr sumed, unless the accused show reasonable grounds for believi that he was authorised to act as he did, and acted on that belie A similar presumption arises in civil actions, where the a complained of is unlawful. Thus, on the one hand, whe the act was primâ facie *unlawful*, malice in law is presume For instance, in actions of slander, though it appear that t defendant was not actuated by ill-will against the plaint malice *in law* will usually be inferred from the fact of inte tional publication.[3] And in other actions for damages found on wrongs, as for a malicious arrest, a malicious prosecuti and the like, the fact that the defendant has had recourse

C. 257; R. *v.* Wallace, 1853, 3 Ir. C. L. R. 38; and R. *v.* Creevey, 1813, 1 M. & Sel. 273.

[1] Fost. C. L. 255.

[2] R. *v.* Beard, 1837, 8 C. & P. 143.

[3] Bromage *v.* Prosser, 1825, 4 B. & C. 247, where Bayley, J., as to *implied* (or legal) malice (as distinguished from malice in fact), says: "Malice, in the common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. . . . If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for t injury it produces? And I app hend the law recognises the dist tion between these two descripti of malice, malice in fact and mal in law, in actions of slander. In ordinary action for words, it is s ficient to charge that the defend spoke them falsely; it is not nec sary to state that they were spol maliciously. This is so laid down Sty. 392, and was adjudged up error in Mercer *v.* Sparkes, 15 Owen, 51. The objection there w that the words were not charged have been spoken maliciously, the court answered, that the wo were themselves malicious and sl derous, and, therefore, the judgm was affirmed. But in actions such slander as is primâ facie cusable on account of the cause speaking or writing it, as in the c of servants' characters, confiden advice, or communications to pers who ask it, or have a right to exp it, malice in fact must be proved the plaintiff, and in Edmonson Stevenson, 1765, Bull. N. P. 8, Mansfield takes the distinction tween these and ordinary actions slander."

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§§ 118, 119.

roceedings raises a primâ facie inference in his favour, he plaintiff is bound to rebut by proving the absence of onable and probable cause,[1] and the presence of an actual us intent.[2] On the other hand, where the act was primâ *vful*, and an action cannot be maintained in respect of it on proof of "malice," malice in law will not be implied, s necessary that *actual* malice be proved. If, therefore, sory language was used upon a privileged occasion, the must establish *actual* malice,[3] and in order to do this, ither by extrinsic or by intrinsic evidence,[4] prove facts are *inconsistent* with bona fides.[5] The occasion being the primâ facie legal presumption, which exists till it is d by actual evidence, is that the speaker was actuated by motives.[6] The transmission by post-office telegram or l of libellous matter, which would have been privileged by sealed letter, avoids the privilege, and is evidence of unless the communication would not be understood by ons through whose hands it passed as referring to the .[8]

. Some presumptions also exist with respect to the *owner-* property. Thus, with regard to *boundaries* of property,[9]

h *v.* North East. Ry. Co., A. C. 247. See, also, *v.* Smyth, 1887, 20 L. R.

ell *v.* Jenkins, 1833, 5 B. 4; Porter *v.* Weston, 1839, N. C. 715; Johnstone *v.* 1786, 1 T. R. 545. The , but are not *bound* to infer fact from the want of cause: Id.

v. Molyneux, 1877, 3 237.

e *v.* Wildes, 1855, 24 L. J. .

od *v.* Spyring, 1834, 1 C. 181; Whitfield *v.* South Co., 1858, 27 L. J. Q. B. head *v.* Richards, 1846; Maule, 1869, L. R. 4 Ex. ght *v.* Woodgate, 1835, 2 R. 573; Taylor *v.* Hawkins, L. J. Q. B. 313; Gilpin *v.* 1854, 23 L. J. Ex. 152; e *v.* Hawkins, 1851, 20 L. J. C. P. 131; Harris *v.* Thompson, 1853, 13 C. B. 333; R. *v.* Wallace, 1853, 3 Ir. C. L. R. 38. In an action for alleged libel contained in an answer to inquiries respecting a servant's character, the jury may find express malice from the simple fact that the answer complained of was untrue to defendant's knowledge. Fountain *v.* Boodle, 1842, 3 Q. B. 5.

[6] Note *b* to Hodgson *v.* Scarlett, 1818, 1 B. & Ald. 232; approved of by Alderson, B., in Gibbs *v.* Pike, 1842, 12 L. J. Ex. 257.

[7] Williamson *v.* Freer, 1874, L. R. 9 C. P. 393.

[8] Sadgrove *v.* Hole, [1901] 2 K. B. 1 (C. A.).

[9] As to boundaries of counties, &c., in Ireland, see 35 & 36 V. c. 48 ("The County Boundaries (Ireland) Act. 1872"), §§ 2, 3, 4, cited post, § 1771.

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§ 119. where two counties or parishes are separated by a non-tidal[1] r
the mid-stream is the presumptive boundary between them ;[2]
owner of a several fishery is, when the terms of the grant are
known, presumed to be the owner of the soil,[3] and this
whether it is a tidal river,[4] a public navigable river,[5]
river neither public nor navigable; [6] the soil of unnavigable ri
usque ad medium filum aquæ,[7] together with the right of fis
—but not the right of abridging the width, or interfering with
course, of the stream,[8]—is presumed to belong to the own
the adjacent land,[9] but it appears to be doubtful whether
a presumption arises in respect of land allotted under a statu
award ;[10] and, in navigable rivers and arms of the sea, the s
primâ facie vested in the Crown, and the fishery is primâ
public.[11] These presumptions as to riparian ownership in str
do not, however, apply to great non-tidal inland lakes, wh

[1] Bridgwater Trust *v.* Bootle-cum-Linacre, 1866, L. R. 2 Q. B. 4.

[2] R. *v.* Landulph, 1834, 1 M. & Rob. 393; M'Cannon *v* Sinclair, 1859, 28 L. J. M. C. 247; R. *v.* Strand Board of Works, 1864, 33 L. J. M. C. 33.

[3] D. of Somerset *v.* Fogwell, 1826, 5 B. & C. 875; Holford *v.* Bailey, 1850, 18 L. J. Q. B. 109; Marshall *v.* The Ulleswater St. Navig. Co., 1863, 32 L. J. Q. B. 139. But see observations, contrà, by Cockburn, C.J., in S. C., at pp. 747—749; also Bloomfield *v.* Wharton, 1867, Ir. R. 8 C. L. 68.

[4] Beaufort *v.* Aird, 1904, 20 T. L. R. 602.

[5] Hindson *v.* Ashby, [1896] 2 Ch. 1, at p. 10 (C. A.).

[6] Hanbury *v.* Jenkins, [1901] 2 Ch. 401 (Cozens-Hardy, J.), and see Ecroyd *v.* Coulthard, [1898] 2 Ch. 358.

[7] Where the *alveus* between the banks of a river is divided by an island or islands into main and subsidiary channels, the subsidiary channels being at times dry, but carrying water when the river is in its ordinary state, the *medium filum* of the river has in Scotland been held to be the centre line of the *alveus* from bank to bank, and not the centre line of the main stream: Menzies *v.* Breadalbane (Sc.), [4 F. 55, Ct. of Sess. Where, ever, there was an ancient isla which the plaintiff could clai title, opposite the plaintiff's ban *medium filum* was held to be the line between the island and the tiff's bank, and not the centre l the whole river from bank to Great Torrington Commons Co vators *v.* Moore-Stevens, [1904] 347 (Joyce, J.).

[8] Bickett *v.* Morris, 1866, L. H. L. 47.

[9] Carter *v.* Murcot, 1768, 4 2163; Wishart *v.* Wyllie, 18 Macq. 389; Lord *v.* Commis City of Sydney, 1859, 12 Moo. C. 473; Crossley *v.* Lighte 1867, L. R. 3 Eq. 279; Dwy Rich, 1871, Ir. R. 6 C. L. 144.

[10] Ecroyd *v.* Coulthard, [18 Ch. 554 (North, J.), affirmed [2 Ch. 358 (C. A.).

[11] Carter *v.* Murcot, 1768, 4 2163; Malcomson *v.* O'Dea, 10 H. L. C. 593. The word " gable" used in a legal sen applied to a river in which th primâ facie belongs to the Crown the fishing to the public, in that the river is one in whic tide ebbs and flows: Murph Ryan, 1848, 16 W. R. 678 (Ir.).

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§ 119.

le or not.[1] But somewhat similar presumptions are ed in respect of the sea-shore. Land there which ed by the ordinary high water,—or, to speak more accu- y the medium high tide between the spring and the neap,[2] sumed primâ facie to be the property of the Crown, though t or prescription it may belong to the lord of the manor, y other subject;[3] while that which is overflowed only at ide, is presumed to be vested in the proprietor of the ad- lands;[4] land between high and low water mark, though part of the body of the adjoining county,[5] is primâ facie ed to be extra-parochial.[6] Similarly, waste land on the nd the soil to the middle, of a highway, are, in the absence nce to the contrary, presumed to belong to the owner of ining inclosed land, whether he be a freeholder, lease- or copyholder;[7] and this is so whether it be a highway in ntry, or a street in a town.[8] This presumption is founded pposition that the proprietor of the adjoining land, at some period, gave up to the public for passage all the land his inclosure and the middle of the road,[9] and is, conse- liable to be rebutted by showing that the road has never een dedicated to the public at all,[10] or that it was originally by commissioners under an Act of Parliament which

nfield *v.* Wharton, 1867, 8 C. L. 68; Bristow *v.* , 1878, 3 App. Cas. 641. Gen. *v.* Chambers, 1854, 23 662.

dell *v.* Catterall, 1821, 5 d. 293; Lopez *v.* Andrew, Man. & Ry. 329; Calmady 1848, 6 C. B. 861. See post, 31. Although the foreshore roperty of the Crown, it is ne full sense of the word a and the public have limited passage over it: Llandudno ouncil *v.* Woods, [1899] 2 And see Brinckman *v.* 1904] 2 Ch. 313, as to public er foreshore generally.

e *v.* Govett, 1832, 1 L. J. 4.

leton *v.* Brown, 1860, 30 C. 1.

. Musson, 1858, 27 L. J. 0; Waterloo Bridge Co. *v.* Cull, 1859, 28 L. J. Q. B. 75. This presumption applies not only to the main seashore, but also to an estuary or arm of the sea: Ipswich Dock Commrs. *v.* St. Peter, Ipswich, 1867, 7 B. & S. 310; and to the shore of a tidal river: Bridgwater Trust *v.* Bootle-cum-Linacre, 1867, L. R. 2 Q. B. 4.

[7] Doe *v.* Pearsey, 1827, 7 B. & C. 304; Steel *v.* Prickett, 1819, 2 Stark. N. P. 463; Cooke *v.* Green, 1823, 11 Price, 736; Scoones *v.* Morrell, 1839; M. of Salisbury *v.* Gt. N. Ry. Co., 1858, 28 L. J. C. P. 40; Simpson *v.* Dendy, 1860, 8 C. B. (N.S.) 433; Berridge *v.* Ward, 1861, 30 L. J. C. P. 218; R. *v.* Strand Board of Works, 1864, 33 L. J. M. C. 33. See Gery *v.* Redman, 1875, 1 Q. B. D. 161.

[8] White's Charities, Re, [1898] 1 Ch. 659.

[9] Doe *v.* Pearsey, 1827, 7 B. & C. 304.

[10] Leigh *v.* Jack, 1879, 5 Ex. D. 264.

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§ 119. imposed duties and obligations inconsistent with the pr
tion,[1] or that it was originally dedicated by some other
or that the lord of the manor, or even that a stranger, ha
cised acts of ownership, either over the spot in dispute,
other waste land in immediate connection with it;[3] but it
doubtful whether this presumption applies to building est
schemes, or to leases or grants from the Crown.[4] The pr
tion just mentioned as usually prevailing in the case of a
highway, also obtains in the case of a private occupati
running between two properties. In the absence of all e
of acts of ownership, each owner will be presumed to be t
prietor of the soil usque ad medium filum viæ.[5] And th
fact that the owner of a field has a private right of way
lane leading only to that field, affords no presumption th
soil of the lane is vested in him.[6] Indeed, as to roads
under the first general Inclosure Act, the presumption tha
herbage and grass arising therefrom" belongs to the pro
of the adjoining lands is conclusive.[7] As to roads made un
later Act of William the Fourth, the commissioners are d
to award "the grass and herbage growing and renewing
them to such persons as in their judgment are best entitle
same.[8] But as both Acts are silent respecting the owner
the *soil*, it seems that no legal presumption as to *that* can
either Act, arise in favour of the proprietors of the neighb
allotments.[9] In the case of an ordinary highway running b
fences, although it may be of varying and uncertain w
appears correct to say, although doubts have been cast up
proposition by eminent judges, that there is a primâ fa
sumption that the public right of way extends over the
space between the fences, and that all the ground that is b

[1] Mappin *v.* Liberty, [1903] 1 Ch. 118 (Joyce, J.).
[2] Headlam *v.* Headley, 1810, Holt. N. P. 463.
[3] Doe *v.* Kemp, 1835, 2 Bing. N. C. 102; Grose *v.* West, 1816, 7 Taunt. 39; Anon., 1773, Lofft, 358; Doe *v.* Kemp, 1831, 7 Bing. 336; Doe *v.* Hampson, 1847, 17 L. J. C. P. 225; Beckett *v.* Corporation of Leeds, 1871, L. R. 7 Ch. 421.
[4] Mappin *v.* Liberty, supra
[5] Holmes *v.* Bellingham, L. J. C. P. 132.
[6] Smith *v.* Howden, 1863, (N.S.) 398.
[7] 41 G. 3, c. 109, § 11 ("closure (Consolidation) Act,
[8] 6 & 7 W. 4, c. 115, § 29.
[9] R. *v.* Hatfield, 1835, 4 A 156; R. *v.* Edmonton, 1831, Rob. 32.

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es is presumedly dedicated as a highway, unless the nature round or other circumstances rebut the presumption.[1]

Further presumptions of law with regard to boundaries ollows: Where fields belonging to different owners are d by a hedge and ditch, the hedge primâ facie belongs to er of the field in which the ditch is not.[2] The common a wall separating lands or houses which belong to different ors is primâ facie evidence that the wall, and the land on stands, belong to them in equal moieties as tenants in .[3] But this presumption may be rebutted by showing wall in fact stands on land, parts of which were separately ted by each proprietor.[4] There is[5] a distinction between and a wall; the former, being made of *earth* taken from cent soil, is presumed to belong to the party whose land thereto; the latter, being built of materials brought from ce, is primâ facie the property of the person who is bound r it. Where a tree grows on the boundary of two fields, the roots extend into the soil of each, the property in the resumed to belong to the owner of that land in which it sown or planted.[6]

. The following *disputable* presumptions arise when the

United Kingdom Electric Co., 1862, 6 L. T. 378; Truro Rural District Coun-] 2 Ch. 638 (Joyce, J.); Hendon Urban District 1899, 81 L. T. 405 (C. A.); er Russell, C.J., in case last more *v.* Kent County Coun-] 1 Ch. 873 (Cozens-Hardy, Att.-Gen. *v.* Perry, (1904) 47.

v. West, 1808, 2 Sel. N. P. Where there are two ditches, ach side of the hedge, no ion arises, and the owner- the hedge depends upon see id.; nor, semble, does unless it appear that the tificial: Marshall *v.* Taylor, Ch. 641 (C. A.). It was a recent case (Henniker *v.* 1904, 90 L. T. 157) that umption was not displaced ce that the other owner had y fifty years trimmed the fence, pollarded the trees, and cleansed the ditch, there being no evidence that these acts were done with the knowledge of the presumptive owner of the fence. In France, boundary hedges and the trees in them are declared to be common property, *mitoyens*, except in certain cases: Code Civ., arts. 670, 673.

[3] Cubitt *v.* Porter, 1828, 8 B. & C. 257; Wiltshire *v.* Sidford, 1827, 1 M. & Ry. 404; Watson *v.* Gray, 1880, 14 Ch. D. 192.

[4] Matts *v.* Hawkins, 1813, 5 Taunt. 20; Murly *v.* M'Dermott, 1838, 8 A. & E. 138.

[5] D. of Newcastle *v.* Clark, 1818, 8 Taunt. 627; Callis on Sewers, p. 74, 4th ed.

[6] Holder *v.* Coates, 1827, M. & M. 112; Masters *v.* Pollie, 1620, 2 Roll. R. 141; contrà, Waterman *v.* Soper, 1697, 1698, 1 Ld. Ray. 737; Anon., 1623, 2 Roll. R. 255.

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§ 121. surface and the property lying beneath it are vested in di owners. In the case of land, if the surface and the sul minerals are vested in different owners without any deeds lating their respective rights, the law presumes that the ov the surface has a right to the *support* of the minerals.[2] Sim when a building is divided into different flats, the propri every upper story has a presumptive legal right, witho express grant, or enjoyment for any given time, to the s of each lower story, and the owner of each lower story is e to the protection afforded by the upper rooms as a roof or ing for his dwelling.[3] When two adjoining closes, or two buildings,[4] respectively belong to different persons, the ov the one is presumed to have a limited right[5] to the *lateral* of the other.[6] This presumption of a right to support d extend to a case where, by the erection of modern buildi additional weight has been put upon the land.[7] Yet ever if the house has been built for more than twenty years, t will presume the grant of an easement entitling the gra have his house supported by the soil of his neighbour's pro

[1] Where such deeds exist, see Aspden *v.* Seddon, 1875, L. R. 10 Ch. 394; Davis *v.* Treharne, 1881, 6 App. Cas. 460.

[2] Humphries *v.* Brogden, 1848, 20 L. J. Q. B. 10; Smart *v.* Morton, 1855, 24 L. J. Q. B. 260; Harris *v.* Ryding, 1839, 5 M. & W. 60; Haines *v.* Roberts, 1857, 25 L. J. Q. B. 353; Rowbotham *v.* Wilson, 1861, 30 L. J. Q. B. 49; Caledonian Ry. Co. *v.* Sprot, 1856, 2 Macq. 449. See Elliot *v.* The N. East. Ry. Co., 1863, 32 L. J. Ch. 402; Brown *v.* Robins, 1859, 28 L. J. Ex. 250; Fletcher *v.* Gt. W. Ry. Co., 1859, 29 L. J. Ex. 253; Gt. W. Ry. Co. *v.* Bennett, 1867, 36 L. J. Q. B. 133; Pountney *v.* Clayton, 1883, 11 Q. B. D. 820; Jeffries *v.* Williams, 1850, 20 L. J. Ex. 14; Rogers *v.* Taylor, 1858, 27 L. J. Ex. 173; Eadon *v.* Jeffcock, 1872, L. R. 7 Ex. 379; Hext *v.* Gill, 1872, L. R. 7 Ch. 699; Dugdale *v.* Robertson, 1857, 3 K. & J. 695. The right of support is an ordinary right of property incidental to all land, and not a right founded on any presumption of a grant or an easement: Backhouse *v.* Bonomi, 1861, Q. B. 181; also Wakefield *v* Buccleuch, 1866, L. R. 4 E also May. of Birmingham *v* 1877, 6 Ch. D. 284; Dixon *v* 1883, 8 App. Cas. 833. An fresh subsidence of a wor mine gives a new cause of Mitchell *v.* Darley Main Co 1886, 11 App. Cas. 127.

[3] Humphries *v.* Brogden, L. J. Q. B. 10; Caledonian *v.* Sprot, 1856, 2 Macq. 449.

[4] Lemaitre *v.* Davis, 1881, D. 281.

[5] See Smith *v.* Thackeray L. R. 1 C. P. 564; and Sic Short, 1877, 2 C. P. D. 572.

[6] 2 Roll. Abr. 564, Tresp pl. 1, cited in 12 Q. B. 743.

[7] Murchie *v.* Black, 1865, C. P. 337.

[8] Wyatt *v.* Harrison, 1832, K. B. 237; Hide *v.* Thornb 1846, 2 C. & K. 250; Part Scott, 1838, 3 M. & W. 220 which cases are commented Humphries *v.* Brogden, 18 L. J. Q. B. 10. See Hunt *v.*

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§ 121.

sement has been enjoyed peaceably, openly, and without mpt at deception or concealment.[1] Where, too, a land- naving built two or more adjoining houses in such a way quire mutual support, or mutual drainage, afterwards ne of them to another, or parts with them by simultaneous o different persons, a grant or reservation will, in general,[2] umed entitling each grantee to have his house supported rained through, the adjoining buildings.[3] In addition to olied grant of support and drainage, upon a grant by the f a tenement of a part thereof to another, a grant will be of all continuous and apparent easements over the part , or, in other words, of all those easements which are bly necessary to the reasonable enjoyment of the property , and which have been and are, at the time of the grant, the owner of the entirety for the benefit of the part ;[4] and upon simultaneous grants of parts of a tenement rent grantees similar grants and reservations will be for the benefit of each part granted.[5] Although the s of the courts and the dicta of the judges were at one y conflicting on the subject,[6] it must now be taken to be aw that no similar reservation is implied for the benefit grantor of any easements over the part granted,[7] except are easements of necessity, such as a right of way to the

L. J. Ch. 785; Jeffries *v.* , 1850, 20 L. J. Ex. 14; Taylor, 1858, 27 L. J. Ex.

on *v.* Angus, 1881, 6 App. The enjoyment must have such a character that an owner of land diligent in ction of his interests would must be taken to have, a le opportunity of becoming such enjoyment: Union ge Co. *v.* London Graving , [1902] 2 Ch. 557. Murchie *v.* Black, 1865, 34 P. 337.

ards *v.* Jenkins, 1868, 18 ; Richards *v.* Rose, 1852, 9 Pyer *v.* Carter, 1856, 1 H. . (These last two cases must considered to be overruled ldon *v.* Burrows and other cases cited post, n. [7], so far as they deal with implied reservations for the benefit of the grantor.) See also Solomon *v.* Vintners' Co., 1859, 4 H. & N. 585; and Kempston *v.* Butler, 1861, 12 Ir. C. L. R. 516.

[4] Wheeldon *v.* Burrows, 1878, 12 Ch. D. 31 (C. A.).

[5] Compton *v.* Richards, 1814, 1 Price, 27; Allen *v.* Taylor, 1880, 16 Ch. D. 355.

[6] Pyer *v.* Carter, 1856, supra; Richards *v.* Rose, 1853, supra; Riviere *v.* Bower, 1824, R. & M. 24, per Ld. Tenterden.

[7] Wheeldon *v.* Burrows, 1878, supra; Suffield *v.* Brown, 1864, 4 De G. J. & S. 185; Crossley *v.* Lightowler, 1867, L. R. 2 Ch. 478; Allen *v.* Taylor, 1880, supra; Taws *v.* Knowles, [1901] 2 Q. B. 564; Ray *v.* Hazeldine, [1904] 2 Ch. 17.

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§§ 121—122a.

part retained, if the grantor has no means of access theret over the part granted.[1] The duration of these implied g limited by the estate which the grantor had in the tenement at the time of the severance; and, if he subse acquires a larger estate, such estate will not be bound servitude.[2]

§ 122. With regard to *manors*, the following disputal sumptions exist. The lord of the manor is primâ facie to all *waste* lands within the manor; and it is not ess necessary that he should show acts of ownership upon The lord, in exercising his right as owner of the soil gravel, marl, loam, or subsoil, so long as he can do it injury to the commoners, will be presumed not to have e his limited powers, and if they complain the tenants must some evidence that he has done so.[4] In the case of an "a ment" by him, however, the presumption is against th apparently on the ground that, as he has made a grant o whole waste, his right to inclose any portion of it must be tional on his establishing that sufficient waste is left tenants to enjoy their rights of common.[5]

§ 122A. When a tenant encroaches upon and inclo waste contiguous to his farm, he is presumed, in the of facts proving a contrary intention, to have done it benefit of his landlord.[6] This presumption will be rec even though the lands inclosed be the property of a str

[1] Pinnington *v.* Galland, 1853, 9 Ex. 1; and see Pearson *v.* Spencer, 1861, 2 B. & S. 761; and see Shubrook *v.* Tufnell, 1882, 46 L. T. 886.

[2] Booth *v.* Alcock, 1873, L. R. 8 Ch. 663.

[3] Doe *v.* Williams, 1836, 7 C. & P. 332.

[4] Hall *v.* Byron, 1876, 4 Ch. D. 667.

[5] Id.; Arlett *v.* Ellis, 1827, 7 B. & C. 346; Lascelles *v.* Ld. Onslow, 1877, 2 Q. B. D. 433, 450.

[6] Doe *v.* Jones, 1846, 16 L. J. Ex. 58; Andrewes *v.* Hailes, 1855, 22 L. J. Q. B. 409; Kingsmill *v.* Millard, 1855, 11 Ex. 313; Ld. Lisburne *v.* Davies, 1866, L. R. 1 C. P. 259; Doe *v.* Massey, 1851, 2 Q. B. 434; Doe *v.* William 7 C. & P. 332; Doe *v.* Murre 8 C. & P. 134; Doe *v.* Re 1 A. & E. 531; Doe *v.* 1854, 23 L. J. C. P. 57; W *v.* Humphries, 1871, L. R. 1; Att.-Gen. *v.* Tomline, Ch. D. 750. Formerly th was otherwise: see Doe *v.* M 1795, 1 Esp. 460; Doe *v.* 1795, 1 Esp. 461. To ra presumption the land must be ing or adjacent to the land and must be waste lan Hastings *v.* Sadler, 1898, 7 355.

[7] Cases cited in last note.

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§§ 122a, 123.

ll be much strengthened, if the landlord of the farm be e lord of the waste.[1]

3. A presumption of *ownership* in many cases arises from *ion*, as men generally own the property they possess.[2] resumption arises under the Factors Act;[3] under the Scotch, and English Acts relating to injuries done by dogs p;[4] under the Pawnbrokers Act, 1872, so far as relates to ders of pawn-tickets;[5] and also under most of the statutes ising the compulsory sale of lands for particular purposes; instance, in the Lands Clauses Consolidation Act.[6] It may illustrated by a great variety of cases at common law. Thus ction on a policy of insurance on ship and cargo, plaintiff ly on the mere fact of possession,[7] or of having purchased p's stores,[8] without the aid of any documentary proof or eds, unless such further proof be rendered necessary by ontrary evidence. In matters relating either to real or al property, possession again gives rise to the same pre- on of ownership, which in the case of real property, is ed to be ownership in fee.[9] Indeed, in actions for *trespass* property, the presumption arising from the possession, nst a mere wrongdoer, amounts to *conclusive* evidence.[10] ore, in an action for injury done to the reversion of real

an *v.* Winwood, 1808, 1 Taunt.

b *v.* Fox, 1797, 7 T. R. 397. & 53 V. c. 45. See Heyman ker, 1863, 32 L. J. C. P. 132; *v.* Swainson, 1863, 32 L. J. 1; Fuentes *v.* Montis, 1868, C. P. 93; Vickers *v.* Hertz, R. 2 H. L. (Sc.) 113; John- Crédit Lyonnais Co., 1877, 3 32. "Hiring agreements" within the Factors Act, and does not enable a hirer to property in goods for which ot paid: Helby *v.* Matthews, A. C. 471 (H. L.); but an nt under which the so-called s no option to terminate the y delivering up to the owner greement to buy under the ull Ropes Co. *v.* Adams, 5 L. J. Q. B. 114 (C. A.); on *v.* Beale, 1896, 74 L. T. A.).

[4] 25 & 26 V. c. 59 ("The Dogs (Ireland) Act, 1862"), § 2. See also, 28 & 29 V. c. 50, § 7, Ir.; 26 & 27 V. c. 100 ("The Dogs (Scotland) Act, 1863"), § 2, Sc.; and 28 & 29 V. c. 60 ("The Dogs Act, 1865"), § 2.

[5] 35 & 36 V. c. 93, § 25.

[6] 8 & 9 V. c. 18, § 79.

[7] Robertson *v.* French, 1803, 4 East, 130; Sutton *v.* Buck, 1810, 2 Taunt. 302.

[8] Thomas *v.* Foyle, 1803, 5 Esp. 88.

[9] Doe *v.* Coulthred, 1837, 7 A. & E. 235; Jayne *v.* Price, 1814, 5 Taunt. 326; Doe *v.* Penfold, 1838, 8 C. & P. 537. See Metters *v.* Brown, 1863, 32 L. J. Ex. 138, as to how this presumption can be rebutted.

[10] Elliott *v.* Kemp, 1840, 10 L. J. Ex. 321.

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§§ 123, 124.

estate, proof of the receipt of rent[1] by the plaintiff will, the sum annually received be so small as to raise a presu that it is a mere quit rent,[2] be sufficient evidence of title reversion as against all the world, except the real own persons claiming under him.[3] In actions against wrong for injuries to *personal* chattels, proof of possession, when c with evidence that the plaintiff has some special property chattels has, too, long been held to constitute a complete Therefore, an undischarged bankrupt may[5] sue in tr wrong-doer who has taken goods out of his custody; pos of a ship under a transfer from the rightful owner, void the register Acts for non-compliance therewith, con a sufficient title to support an action of trover aga stranger for converting a part of the ship which was wre even a general bailment will suffice, without being made special purpose, but only for the benefit of the rightful o and a mere naked possession will (when no more is p entitle a party to maintain trover as against a wrong though it will not entitle a mere bailee, who is proved to be no liability to his bailor, to maintain an action for neg against a third party.[9]

§ 124. Many cases show, that an apparent stranger instrument may be so far connected with it, by the fact ducing it, as to make it evidence for a jury in support claim.[10] Thus the production of an I O U signed by the dant, though not addressed to anyone by name, is, in ge

[1] See, also, 23 & 24 V. c. 154, § 24, Ir., which makes the receipt of rent, under certain circumstances, for a certain period, primâ facie evidence of a landlord's derivative title.

[2] Doe *v.* Johnson, 1819, Gow, N. P. 173; recognised in Reynolds *v.* Reynolds, 1848, 12 Ir. Ch. R. 172.

[3] Daintry *v.* Brocklehurst, 1848, 18 L. J. Ex. 57.

[4] Elliott *v.* Kemp, 1840, 10 L. J. Ex. 321.

[5] Webb *v.* Fox, 1797, 7 T. R. 391; Drayton *v.* Dale, 1823, 2 B. & C. 293; Fryson *v.* Chambers, 1842, 11 L. J. Ex. 190; these were decisions under the old law.

[6] Sutton *v.* Buck, 1810, 2 302.

[7] Per Chambre, J., id. 309

[8] Jeffries *v.* Gt. West. R 1856, 25 L. J. Q. B. 107, w solves a doubt raised by Pa in Fryson *v.* Chambers, 1842 Ch. R. 172; Fitzpatrick *v.* I 1851, 1 Ir. C. L. R. 366. Armory *v.* Delamirie, 1721, Str. 505; Sutton *v.* Buck, Taunt. 302.

[9] Claridge *v.* South Staff Rail. Co., [1892] 1 Q. B. 422.

[10] Fesenmayer *v.* Adcock, M. & W. 449.

[11] But it will not furnish e of an account stated, if the de

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§§ 124, 125.

ant evidence, not indeed of money lent (of which it hes no proof whatever),[1] but of an account stated between rties,[2] and if a letter be given in evidence with the direc- rn off, the jury would do well to, primâ facie, believe the producing it, if he says that it was addressed to himself.[3]

25. As possession is primâ facie proof of ownership in s for the recovery of land, it is on the one hand an ble rule that the plaintiff must solely rely on the strength own legal title, and on the other hand clear that proof of r possession by the plaintiff, however short, will be primâ evidence of title as against a wrong-doer.[4] Thus, where aintiff had given possession of a room to a third party, he ld entitled to recover against the defendant who had, about r afterwards, broken into the room at night and taken the and again, where on the plaintiff's part, possession for -three years, and making increases of rent during that , were proved, it was held that defendant could not rebut esumption of a seisin in fee arising from these unequivocal f ownership by merely showing a subsequent possession ss than twenty years[6]) by himself. The presumption of ship which arises from possession will in general extend ly to the surface of the land which has been the subject session, but to all minerals which are under it.[7] Still, this mption is not universal, since in mining districts the right minerals and the fee-simple of the soil are frequently in nt persons. Even where it arises it may be rebutted by ng either an absence of enjoyment of the minerals by the

w that, in fact, it was not n acknowledgment of a debt emere *v.* Elliott, 1861, 30 x. 350.

enmayer *v.* Adcock, 1847, 16 V. 449; questioning Douglas ne, 1840, 12 A. & E. 641.

last note; Curtis *v.* Rickards, M. & Gr. 47; Croker *v.* 1852, 2 Ir. C. L. R. 552. lson *v.* Wilson, 1854, 14 C. B.

tis *v.* Rickards, 1840, 1 M. &

ner *v.* Whitelock, 1865, L. R. 1.

[5] Doe *v.* Dyeball, 1829, 3 C. & P. 610. See Doe *v.* Barnard, 1849, 13 Q. B. 945.

[6] Doe *v.* Cooke, 1831, 7 Bing. 346. See also, Brest *v.* Lever, 1841, 10 L. J. Ex. 337.

[7] But see "The Transfer of Land Act, 1862" (25 & 26 V. c. 53), § 9, and "The Land Transfer Act, 1875" (38 & 39 V. c. 87), § 18, both of which statutes, for purposes of registration of title, recognise an opposite presumption, unless, in the description of the land, mines or minerals be expressly mentioned.

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§§ 125—127.

owner of the soil, or an actual user of the minerals by a stra
A very similar primâ facie presumption is that the tenant
surface is tenant of the subjacent strata. But this presun
also is liable to be defeated by proof that the surface an
subsoil have become separate tenements.[2]

§ 126. The presumption of title arising from possessio
always be much strengthened by proof of uninterrupted
ment for a considerable time. In many cases, indee
legislature has, as before observed,[3] fixed what perio
undisturbed possession will suffice to confer an absolute
In such cases, when the party by his pleading shows t
relies upon the statutory limitation, no lapse of time but
the full period fixed by Act of Parliament will justify a pre
tion in support of the claim.[4] If, however, a party, inst
depending upon the statute-law, relies (as he may do)
common-law presumption, or a lost grant, enjoyment for
period than the statutory number of years, when couple
other circumstances, will warrant a jury in finding a verdict
favour.[5]

§ 127. The principles of legal presumption which we ha
been discussing apply, indeed, to all cases to which the st
of limitation do not extend, though in many of them they
necessity only capable of a vague interpretation. For ins
though (as we have just incidentally seen[6]) a plaintiff seek
recover land is bound to establish his own title, he will
required to prove strictly every successive link in it, pr
that the property has been long in his possession. Ther
when a person claiming under a feoffment proved that h
had uninterrupted enjoyment of the premises for twenty
the court and jury presumed, in his favour, that the nec

[1] Rowe *v.* Grenfel, (1824) Ry. & M. 398; Rowe *v.* Brenton, 1828, 8 B. & C. 737; Hodgkinson *v.* Fletcher, 1871, 3 Doug. 31.

[2] Keyse *v.* Powell, 1853, 22 L. J. Q. B. 305; Smith *v.* Lloyd, 1854, 23 L. J. Ex. 194.

[3] Ante, § 74.

[4] See 2 & 3 W. 4, c. 71, § 6 ("The Prescription Act, 1832"); 2 & 3 W. 4, c. 100, § 8; Eldridge *v.* Knott, 1774, 1 Cowp. 214; Lowe *v.* Car 1851, 20 L. J. Ex. 374.

[5] See Wheaton *v.* Maple [1893] 3 Ch. 48; Bright *v.* V 1834, 3 L. J. Ex. 250; Ld. St *v.* Dunbar, 1845, 13 M. & W Lowe *v.* Carpenter, 1851, 20 L 374; Hanmer *v.* Chance, 18 L. J. Ch. 413.

[6] Ante, § 125.

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§§ 127, 127a.

ities of the old livery of seisin had been complied with.[1] nptions of this latter nature will not, however, now be where the land has been held for a less period than twelve nor will they, where the acts of the parties, or the other n the case, lead to a different inference.[3]

27A. Another disputable presumption of law is that arising he possession of stolen property *recently* after the commis- a theft. Such possession raises a primâ facie presumption ne possessor was either the thief, or the receiver, according other circumstances of the case.[4] This presumption, n rebuttable, is, when unexplained,[5] either by direct ce, or by the character and habits of the possessor, or ise, usually regarded by the jury as conclusive.[6] The on as to what amounts to recent possession, varies accord- the stolen article is or is not calculated to pass readily and to hand. Thus, where two ends of woollen cloth in inished state, consisting of about twenty yards each, were in the possession of a prisoner two months after they had tolen, it was held that the prisoner should explain how ne by the property.[7] But, on the other hand, where the vidence against a prisoner was, that certain tools had been to his possession three months after their loss, an al was directed ;[8] and a similar course was pursued on an nent for horse-stealing, where the horse was not discovered custody of the accused until after six months from the

s *v.* Lloyd, 1811, Wightw. oe *v.* Cleveland, 1829, 9 B. & ; Doe *v.* Davies, 1837, 6 Ex. 176; Doe *v.* Gardiner, L. J. C. P. 222.

t 38 V. c. 57 ("The Real Pro- imitation Act, 1874"); and s in last note.

v. Gardiner, 1852, 21 L. J. 2.

v. Langmead, 1864, 9 Cox, 4.

v. Exall, 1866, 4 F. & F.

East, P. C. 656; R. *v.* ——, The State *v.* Adams, 1789— Hayw. 463 (Am.). "Furtum itur commissum ab illo, penes s furata inventa fuerit, adeo ut si non docuerit à quo rem habuerit, justè, ex illâ inventione, poterit subjici tormentis." 2 Masc. de Prob. concl. 834; Menoch. de Præs. lib. 5, præs. 31. See ante, § 63.

[7] R. *v.* Partridge, 1836, 7 C. & P. 551.

[8] R. *v.* Adams, 1828, 3 C. & P. 600. See R. *v.* Cocking, 1836, 2 Lewin, C. C. 235, where two sacks were found in the prisoner's possession twenty days after they had been missed; and Coleridge, J., left the question to the jury, observing, that "stolen property usually passes through many hands." See the observations of the reporter on this presumption, id.

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§§ 127a—127c. date of the robbery;[1] and where goods, lost sixteen n before, were found in the prisoner's house, but no other ev was adduced against him, he was not called upon for his de The finding of stolen property in the *house* of the ac provided there were other inmates capable of committi larceny, will, moreover, not be *of itself* sufficient to pro possession, however recently the theft may have been effe though, if coupled with proof of other suspicious circumst it may fully warrant the conviction of the accused.[4]

§ 127B. This presumption is in all cases one of *fact* than of law. It is occasionally so strong as to render unnec any direct proof of what is called the *corpus delicti*. Th borrow an apt illustration from Maule, J., if a man were into the London Docks quite sober, and shortly afterward found very drunk, staggering out of one of the cellars, in above a million of gallons of wine are stowed, "this wo reasonable evidence that the man had stolen some of the w the cellar, though no proof were given that any particul had been broached, and that any wine had actually missed."[5]

§ 127C.[6] The presumption under discussion is not confi charges of theft, but extends to all charges, however Thus, on an indictment for arson, proof that property, was in a house at the time it was burnt, was soon after found in the possession of the prisoner, raises a pr presumption that he was present and concerned in burni

[1] R. *v.* Cooper, 1852, 3 C. & K. 318; R. *v.* Harris, 1860, 8 Cox, C. C. 333.

[2] R. *v.* ——, 1826, 2 C. & P. 459.

[3] 2 St. Ev. 614, n. (*g*). See Ex parte Ransley, 1823, 3 D. & R. 572, where the bare finding of smuggled spirits in defendant's house, during his absence from home, was held insufficient to support a conviction under 11 G. 1, c. 30, § 16 (now repealed by 30 & 31 V. c. 59), for knowingly harbouring and concealing. Abbott, C.J., observed, "The mere naked fact of the spirits being found in the defendant's house during his absence cannot b sidered as conclusive evide knowledge to support a con on this statute. There is ab ground for suspicion, but we say that it is a clear and satis ground to convict." See, als Hale, 1778, 2 Cowp. 728.

[4] R. *v.* Watson, 1817, 2 139.

[5] R. *v.* Barton, 1854, Dea See, also, R. *v.* Mockford, 1 Cox, C. C. 16. See, however Williams, 1871, 11 Cox, C. sed qy. this case.

[6] Gr. Ev. § 34.

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;[1] and under similar circumstances a like inference arises cases of murder accompanied by robbery,[2] of burglary,[3] the possession of a quantity of counterfeit money.[4]

8. The maxim, "ex diuturnitate temporis omnia nuntur ritè et solemniter esse acta," is also of great ance. It is a presumption of law that where there has ong continued possession in assertion of a right, the right e presumed to have had a legal origin if such a legal was possible, and that all those acts were done and the stances existed which were necessary to the creation of a legal title;[5] thus, where it appeared that pursuant to a ion of a vestry, a new road had been substituted for an highway repairable by the inhabitants at large, it was ned after many years' user by the public of the new road, ne formalities required by the Highway Act, 1835,[6] had omplied with.[7] This presumption applies even although hown that the original origin was in fact illegal.[8] If, r, the right alleged could never have had a legal existence, gth of user will enable a legal origin to be presumed; lost grant will not be presumed when such grant would een in contravention of a statute.[9] It is also a presump- law that *all* transactions were originally legal and , while the older they are the stronger will be the ption.[10] Such presumption indeed is sometimes, and certain circumstances, conclusive. An instance of this ready been furnished[11] in the case of ancient documents,

v. Rickman, 1789, 2 East, 34.
ls, Cr. Ev. 61.
R. *v.* Gould, 1840, 9 C. & P. *v.* Exall, 1866, 4 F. & F.
. Fuller, 1816, R. & R. C. C. *v.* Jarvis, 1855, 25 L. J.).
lips *v.* Halliday, [1891] A. C. ippens Oil Co., Ltd. *v.* Edin- and District Water Trustees, A. C. 64; and see Simpson *v.* chester Corporation, [1896] 4; and Simpson *v.* Att.-Gen., A. C. 476 (C. A.), affirmed A. C. 696 (H. L.); Att.-Gen. land, [1902] 1 K. B. 690 (C. A.).

[6] 55 & 56 V. c. 57.

[7] Leigh Urban Council *v.* King, [1901] 1 K. B. 747.

[8] London and North Western Ry. *v.* Fobbing Levels Commrs., [1897] 66 L. J. Q. B. 127; Phillips *v.* Halliday [1891] supra.

[9] Neaverson *v.* Peterborough Rural District Council, [1902] 1 Ch. 557 (C. A.); Rochdale Canal Co. *v.* Radcliffe, 1852, 18 Q. B. 287.

[10] Croft *v.* Rickmansworth Highway Board, 1888, 57 L. J. Ch. 589; Postlethwaite *v.* Rickman, 1889, 60 L. T. 514.

[11] Ante, § 87.

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§§ 128, 129.

the due execution of which will be presumed on thei production. And the American courts recognise other tions of the rule. Thus, after[1] the lapse of twenty yea conclusively presume, in favour of every judicial tribuna has acted within its jurisdiction, that all persons inter its proceedings have had due notice.[2] They have also he where an authority is given by law to executors, guardia other officers, to make sales of lands upon being duly lice the courts, but they are required to advertise the sal particular manner, and to observe other formalities, the sufficient time (which in most cases is fixed at thirty raises a conclusive presumption that all the legal for were observed;[3] the licence to sell, and the official char the vendor, being provable by record or judicial regis must in general be so proved; and the deed must also be in the usual manner; but the intermediate proceedi presumed. *Probatis extremis præsumuntur media.* England the valid existence of a bye-law will be inferred any direct proof of its having been passed, or of the l but the court will infer its existence from a usage standing.[4]

§ 129. The maxim, "ex diuturnitate temporis omnia muntur ritè esse acta" has, indeed, since the passing Vendor and Purchaser Act, 1874,[5] become one of the rules, which are henceforth to regulate the practice veyancers and the rights of vendors and purchasers. the Conveyancing and Law of Property Act, 1881,[6] it is

[1] Largely, Gr. Ev. §§ 19 and 20.

[2] Brown *v.* Wood, 1820, 17 Mass. 68 (Am.).

[3] See Pejepscot Prop's *v.* Ransom, 1817, 14 Mass. 145 (Am.); Blossom *v.* Cannon, 1817, 14 Mass. 177 (Am.); Colman *v.* Anderson, 1813, 10 Mass. 105 (Am.); Williams *v.* Eyton, 1859, 27 L. J. Ex. 176; Gray *v.* Gardiner, 1807, 3 Mass. 399 (Am.), holding an interval of twenty-two years sufficient. See cases collected, Broom's Legal Maxims (6th edit. p. 890), tit. "Omnia Præsumuntur, &c."; Society, &c. *v.* Wheeler, 1814, 1 New Hamp. 310 (Am.).

[4] R. *v.* Powell, 1854, 23 L. J. Q. B. 199; Mayor of Hull *v.* 1779, 1 Cowp. 102. See Je Barnes, 1873, L. R. 8 C. P.

[5] 37 & 38 V. c. 78. almost identical with thos text contained in the Act are contained in § 2, sub-s the Act of 1874, and are sa tabular index to statutes year (which is of no autho ever), to be repealed by th 1881, but they are not men the repealing portions (viz. Sched. II. Part III.) of th 1881.

[6] 44 & 45 V. c. 41, § 3, su

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§§ 129, 130.

e purchaser of any property "shall assume, unless the y appears, that the recitals contained in the abstracted ients of any deed, will, or other document forming part itle [prior to the time prescribed by law for its commence- re correct, and give all the material contents of the deed, other document so recited, and that every document so was duly executed by all necessary parties, and perfected, s required, by fine, recovery, acknowledgment, inrolment, rwise." The time prescribed by law for the commence- the title may be fixed by express stipulations, and it is desirable to so fix it, at the same time stating the nature instrument with which the title commences.[1] In the of stipulation,[1] abstracts of title in general[2] commence, eeholds, with a document at least forty years old;[3] as to lds for years, with the lease or underlease;[4] as to the l interest in enfranchised copyholds or customary free- vith the deed of enfranchisement.[5]

. The presumption afforded by the maxim, "ex diuturni- nporis omnia præsumuntur ritè esse acta," has again an nt application where the rights of the Crown are con- Here,[6]—though lapse of time does not of itself furnish usive legal bar to the title of the Sovereign,—yet, if the claim could have had a legal commencement, juries are ed or advised to presume such commencement, after years of uninterrupted possession. Accordingly, royal charters, and even Acts of Parliament, have not in- tly been thus found by the jury, after long-continued le enjoyment, accompanied by the usual acts of owner- the long enjoyment of port duties, tolls, customary dues,

tenholme & Brinton's Con- g Act, 6th ed., p. 2.

Bolton *v.* London School 878, 7 Ch. D. 766.

dor and Purchaser Act (37 & 78), § 1.

2, r. 1; and "The Convey- nd Law of Property Act, 44 & 45 V. c. 41), § 3, ub-s. 2.

Ev. § 45, in part, as to nine

[7] Goodman *v.* Mayor of Saltash, 1882, 7 Q. B. D. 106; Att.-G. *v.* Wright, [1897] 2 Q. B. 316 (C. A.); R. *v.* Brown, 1779, 1 Cowp. 110; May. of Hull *v.* Horner, 1779, 1 Cowp. 102; Eldridge *v.* Knott, 1774, 1 Cowp. 214; Lopez *v.* Andrew, 1826, 3 M. & Ry. 329, n.; Delarue *v.* Church, 1833, 2 L. J. Ch. 113; O'Neill *v.* Allen, 1859, 9 Ir. C. L. R. 132; Doe *d.* Devine *v.* Wilson, 1855, 10 Moo. P. C. C. 527; Little *v.* Wingfield, 1859, 11 Ir. C. L. R. 63;

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§§ 130, 131. fees, or the like, will, if the nature of the case admits it,[1] b warrant the presumption of any fact necessary to ma legal;[2] while if distinct evidence of any such payments as far back as living memory goes, the jury, unless evi the contrary be shown, will not only be quite justified in ing, but will be directed to presume, that such payme immemorial, or at least were referable to a legal origin series of acts of ownership exercised on the seashore adjoining proprietor, or the production by him of a roy conveying the right of wreck,[4] affords abundant eviden jury to presume that the Crown formerly granted the so of his ancestors.[5] On the same principle, after evic possession for nearly forty years of a tract of land, of a pr in council for a survey and of an actual survey, a jury America,[6] been instructed to presume that a patent w issued. A longer period is, however, usually required presumption to arise with regard to Crown or public gra is needed in the case of a grant by a private individual.[7]

§ 131. Again, on the same principle, the uninterrupte a road by the public for forty or fifty years justifies a pres in favour of the original animus dedicandi, although th ground for supposing that the soil of the highway was v the Crown,[8] and this although it is a rule that, to constitut

Roe *v.* Ireland, 1809, 11 East, 280; Goodtitle *v.* Baldwin, 1809, 11 East, 488; Att.-Gen. *v.* Ewelme Hospital, 1853, 22 L. J. Ch. 846; Mather *v.* Trinity Church, 1877, 3 Serg. & R. 509.

[1] See Gann *v.* Free Fishers of Whitstable, 1864, 11 H. L. C. 192; Free Fishers of Whitstable *v.* Gann, and Gann *v.* Johnson, 1863, 11 C. B. (N.S.) 387; 13 C. B. (N.S.) 859; Bryant *v.* Foot, 1868, L. R. 3 Q. B. 497; Lawrence *v.* Hitch, 1868, L. R. 3 Q. B. 521. See also, Mills *v.* May. of Colchester, 1867, L. R. 2 C. P. 476; Forman *v.* Free Fishers of Whitstable, 1869, L. R. 4 H. L. 266.

[2] May. of Exeter *v.* Warren, 1844, 5 Q. B. 801.

[3] Malcolmson *v.* O'Dea, 1862, 10 H. L. C. 593; Mills *v.* May. of Colchester, 1867, L. R. 2 C. P

of Beaufort *v.* Smith, 1849, Ex. 97; Pelham *v.* Pickers 1 T. R. 660; Shephard 1863, 33 L. J. C. P. 158.

[4] Hale de Jure Mar. 25, r in Calmady *v.* Rowe, 1848 861.

[5] Calmady *v.* Rowe, 184 D. of Beaufort *v.* May. of 1849, 3 Ex. 413; Le S Rowe, 1865, 4 F. & F. 1 C.J.); Healy *v.* Thorne, 18 4 C. L. 495. See ante, § 1

[6] Jackson *v.* McCall, Johns. (Am.) 377.

[7] See Mascard de Prob., concl. 199, n. 11, 12.

[8] R. *v.* East Mark, 1848, Q. B. 877; R. *v.* Petrie, L. J. Q. B. 167; Turner 1881, 6 App. Cas. 636. Se

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§§ 131, 131a.

on to the public of a highway, the owner of the soil must so dedicate.[1] Where there was a public footpath, and al land along the same line was devoted by the owner oil to private carriage traffic, there was held to be a pre- n of law in the absence of evidence to the contrary, that er of the soil had dedicated to public use as a footway all e he had in fact devoted to traffic.[2] Even a qualified or dedication of a way may be presumed from continuous ccordingly, where, as far back as living memory goes, the ave enjoyed a right of way across an arable field, and the as ploughed up the whole field, including the path, it is d that the original dedication of the way was subject to t of ploughing it up in due course of farming,[3] and there- public had no right of deviating from it, although the y have become temporarily impassable in consequence of ploughed.[4] Where, too, the facts proved leave room for presumption, property which a parish has enjoyed for a iod may be presumed to be vested in trustees for such

. Although the court will go almost any length to sup- right openly asserted, long continued and never before d if it can find any legal origin for such a right, the con- es not hold good in the case of a burthen however long it ve been borne, for there is no authority for making a tion in favour of an immemorial burthen ;[6] thus if A. and stors have from time immemorial repaired a bridge or a there is no obligation on him to continue to repair unless bound by the tenure of his lands or the like,[7] and simi- erson who under patent or statute has succeeded to the ip of locks or other mechanical appliances for facilitating

rd of Works *v.* Maudslay, . 5 Q. B. 397; Powers *v.* 1880, 49 L. J. Ch. 294. *v.* Huskinson, 1843, 11 M. 7; Chinnock *v.* Hartley Rural Council, 1899, 63 27 (Cozens-Hardy, J.); Goldstraw, 1901, 84 L. T.

ten. *v.* Esher Linoleum Co., 901]2 Ch. 647 (Buckley, J.). r *v.* Woodgate, 1870, 39 L. J. M. C. 21; Arnold *v.* Blaker, 1871, L. R. 6 Q. B. 433.

[4] Arnold *v.* Holbrook, 1873, L. R. 8 Q. B. 96.

[5] Haigh *v.* West, [1893] 2 Q. B. 19.

[6] Simpson *v.* Att.-Gen., [1904] A. C. 476 (Ld. Macnaghten at p. 491).

[7] Steel *v.* Houghton, 1788, 1 H. Bl. at p. 60 (Heath, J.).

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§§ 131a—133. navigation, with a right to charge for their use a reaso is not bound by long user to work or keep them in rep own detriment if the tolls are not sufficient to defray t maintenance.[1]

§ 132. In cases of incorporeal hereditaments, where i able to raise a presumption of lost grant, juries shou required to find as a fact that a deed of grant has bee executed, but without believing any grant to have been m may often, under the instruction of the court, presume ence for the simple purpose of *quieting possession*.[2] Su sumption may be sometimes raised even against a re provided it can be either directly proved, or reasonably that he has had full knowledge of his opponent's actual e of the right in question, and has tacitly assented there the presumption of a grant can only arise when the perso whom the right is claimed might have interrupted or the user relied on.[4] Therefore, the grant of a right to terrupted passage of air to a windmill from over the neighbour, cannot be presumed from an uninterrupted u mill for forty years.[5]

§ 133.[6] Juries are also sometimes advised to presum ances of *corporeal* hereditaments between private indivi favour of the party who has proved a right to the benefici ship, and whose undisturbed possession, being consistent existence of the conveyance required to be presumed reasonable ground for belief that the legal title has in conveyed.[7] This presumption is made in order to pr apparently just title from being defeated by mere forma

[1] Simpson *v.* Att.-Gen., [1904] supra.

[2] Deeble *v.* Linehan, 1860, 12 Ir. C. L. R. 1; following the dicta of Ld. Mansfield in Eldridge *v.* Knott, 1774, 1 Cowp. 214; and of Ld. Wensleydale in Bright *v.* Walker, 1835, 3 L. J. Ex. 250; and in Magdalen Coll. *v.* Walker, 1857, 26 L. J. Ch. 620; and overruling a dictum of Bayley, B., in Day *v.* Williams, 1832, 1 L. J. Ex. 168; Little *v.* Wingfield, 1859, 11 Ir. C. L. R. 63.

[3] Deeble *v.* Linehan, 1860, supra; Winterbottom *v.* Ld. Derby, 1867, L. R. 2 Ex. 316.

[4] Chasemore *v.* Richard L. J. Ex. 81 (H. L.).

[5] Webb *v.* Bird, 1863, C. P. 335 (Ex. Ch.); Lefever, 1879, 4 C. P. D. 1

[6] Gr. Ev. § 46, in part.

[7] Doe *v.* Cooke, 1829, 180. See Doe *v.* Millett, L. J. Q. B. 202, and c cited.

[8] Doe *v.* Cooke, 1829, su *v.* Sybourn, 1796, 7 T. Little *v.* Wingfield, 185 C. L. R. 63, a passage i

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§§ 132—135.

only to be drawn where a party has shown a right good nce, but in some way technically deficient in form.

A presumption in favour of such a conveyance having e will, in general, prevail whenever it was the *duty* of o convey to the beneficial owner at a specified time, as attainment of the age of majority, or on the death of a e vie, or after the payment of debts, legacies, portions, or for in such cases it is reasonable to presume that the have performed their duty, and have done what a court of ould compel them to do.[1] A like presumption probably ere the duty to convey, though not *express*, may *construc*gathered from the object of the trust, as, for instance, estate is vested in trustees for a temporary purpose, s been attained, and no further intention is declared, or onably be inferred, requiring the legal estate to remain ng.[2]

It is said (probably rightly) that this presumption will made *against* the owner of the inheritance, save in cases has attempted to defeat the solemn acts of himself, or of ough whom he claims. If, however, a mortgagor attempt an outstanding fee as against a mortgagee for years, or ntee of a devisee in fee to dispute the right of a former o grant a lease of the premises in question, on the ground legal estate was, at the time of the grant, outstanding in a he jury (even if in cases the estoppel is not pleaded) may a conveyance. In the first case,[3] the presumption will be favour of the honesty of the mortgagor at the time of the e, though against his interest at the time of the trial; and cond,[4] it will prevail, in order to give effect to the grant of or, which would otherwise be void.

ora), in which Tindal, C.J., hat cases this presumption ade, is called in question, down the law too narrowly. nd *v.* Slade, 1792, 4 T. R. *v.* Sybourn, 1796, 7 T. R. *v.* Allen, 1820, 1 Jac. & Emery *v.* Grocock, 1821, 54. In England *v.* Slade, nce from the trustees was though only *three years* had elapsed from the time when they ought to have conveyed.

[2] Hillary *v.* Waller, 1805, 12 Ves. 239; Doe *v.* Lloyd, 1806, Pea. Ev. App. 41. See Sug. V. & P. (14th edit.), 399; Math., Pres. Ev. 215—217.

[3] Per Abbott, C.J., in Doe *v.* Hilder, 1819, 2 B. & Ald. 790; Cottrell *v.* Hughes, 1855, 24 L. J. C. P. 107.

[4] Bartlett *v.* Downes, 1825, 3 B. & C. 616.

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§§ 136, 137.

§ 136. Questions under this head of presumptions f arose in former times, when juries used often to be calle presume the surrender of *outstanding satisfied terms*;[1] bu passed in 1845, provides that every satisfied term of yea *either by express declaration or by construction of law*,[3] s the 31st day of December, 1845, be attendant upon the in or reversion of any land, shall on that day absolutely determine as to the land, upon the inheritance or reversio such term shall be attendant as aforesaid, except that e term of years which shall be so attendant as aforesaid *declaration*, although thereby made to cease and determ afford to every person the same protection against eve brance, charge, estate, right, action, suit, claim, and d it would have afforded to him if it had continued to su had not been assigned or dealt with, after the said 3 December, 1845, and shall, for the purpose of such prot considered in every court of law and of equity to be a s term. It also provides[4] that every term of years now or hereafter to be created, becoming satisfied after the of December, 1845, and which by express declaration or tion of law, shall after that day become attendant inheritance or reversion of any lands, shall, immediately same becoming so attendant, absolutely cease and det to the land, upon the inheritance or reversion whereof s shall become attendant as aforesaid.[5]

§ 137. Notwithstanding this Act, it is perfectly clear presumption can be allowed in favour of the surrender which is still *unsatisfied*,[6] or the *continuance* of which is a special verdict, or admitted in a special case;[7] for, individual hardship may result, it is obviously absurd t

[1] See Garrard *v.* Tuck, 1849, 18 L. J. C. P. 338; Doe *v.* Langdon, 1848, 18 L. J. Q. B. 17.

[2] 8 & 9 V. c. 112.

[3] See Doe *v.* Price, 1847, 16 L. J. Ex. 159; Doe *v.* Moulsdale, 1847, 16 L. J. Ex. 169; Doe *v.* Jones, 1849, 18 L. J. Q. B. 260; Cottrell *v.* Hughes, 1855, 24 L. J. C. P. 107; Plant *v.* Taylor, 1863, 31 L. J. Ex. 289.

[4] § 2.

[5] As to the constructi Act, see § 3.

[6] Doe *v.* Staple, 1788, 2 where the lessor of the pl heir-at-law, and only cl premises subject to the ch

[7] Goodtitle *v.* Jones, 17 47; Roe *v.* Reade, 1799 118.

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§§ 137—142.

rence to be drawn, which is directly opposed, either to rtained fact, or to all reasonable belief.[1]

. A jury may also, under certain circumstances, presume ender of a lease by operation of law. The production essor of a cancelled lease will not, indeed, warrant the otion of such a surrender as will satisfy the Statute of [2] Yet, when the production of the cancelled lease was with proof that a new lease had been granted to another ho, like the former lessee, was a mere trustee for the stuis que trust, and it further appeared, that when leases ewed from time to time, the usage was to send in the e to be cancelled in the lessor's office, the jury were to infer that the second lease was granted with the assent rmer tenant.[3] The unexplained payment of an abated thirty years by a tenant of premises, which were shown been leased to another party for an unexpired term, has ated in Ireland as evidence from which a jury might pre- e surrender of the original lease, and the creation of a ancy from year to year, at the abated rent, in favour of ent occupier.[4]

9—142. The principle "ex diuturnitate temporis omnia untur ritè esse acta" has also been applied in a variety ers other than those mentioned above. Thus, where nt was brought to recover a messuage, demised for a long a lease containing a covenant that the house should not as a shop without the lessor's written consent, with a for re-entry on breach of such covenant, it was held that, f of the uninterrupted user of the premises as a beershop ty years, the jury ought to be directed to presume that a n writing had been duly given;[5] after the lapse of sixty he court, in the absence of any direct evidence, has pre- hat executors, who were proved to have renounced, had

per Bayley, J., in R. *v.* ay, 1830, 10 B. & C. 812. *v.* Thomas, 1829, 9 B. & C. *v.* Abp. of York, 1805, 6 as *v.* Cook, 1818, 2 B. & . See, also, Walker *v.* n, 1837, 6 L. J. Ex. 229. See post, §§ 1009, 1010.

[4] Lefroy *v.* Walsh, 1851, 1 Ir. C. L. R. 311. See, also, Tennent *v.* Neil, 1870, Ir. R. 5 C. L. 418; Ex parte Raymond, 1874, Ir. R. 8 Eq. 231.

[5] Gibson *v.* Doeg, 1858, 27 L. J. Ex. 37.

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§§ 142—144.

also disclaimed an estate in a chattel real, which bequeathed to them by the testator;[1] and it is proposition,[2] that stale demands ought always to be re courts of justice with jealous suspicion,[3] more particul the demand is made against the estate of a dead man, long acquiescence in any adverse claim of right is goo on which a jury may presume that the claim ha commencement;[5] since it is contrary to general expe one man long to continue to pay money to another, or to any inconvenient claim, unless in pursuance of some or other legal obligation.[6]

§§ 143-4. In the great majority of cases to which t "ex diuturnitate temporis omnia præsumuntur ritè e applies it is only available, "donec probetur in cont The application of the presumption arising from it to *official* or *judicial* character will be best illustrated by to one or two decisions.[8] For instance, where decisions are inconsistent with a general order of th reversal of that order ought to be presumed;[9] on an i for perjury proof of the signatures of the defendant, a official before whom a document purports to have been sufficient evidence that the defendant was regularly sw truth of its contents, though the clerk, who proves writing of the official, has no recollection of adminis oath, and admits that the jurat was not written by hims fact that a town was in the military occupation of a and proclamations, purporting to be signed by the g

[1] M'Kenna *v.* Eager, 1875, Ir. R. 9 C. L. 79.

[2] Gr. Ev. § 47, in great part.

[3] Sibbering *v.* Ld. Balcarras, 1850, 19 L. J. Ch. 252. See H., falsely called C., *v.* C., 1862, 31 L. J. P. & M. 103; T. *v.* D., falsely called D., 1866, L. R. 1 P. & D. 127. Thus, too, the non-user of a patent for a series of years raises a strong presumption of its practical inutility: Re Allan's Patent, 1867, L. R. 1 P. C. 507; Re Bakewell's Patent, 1862, 15 Moo. P. C. C. 385; Re Hughes's Patent, 1879, 4 App. Cas. 174.

[4] Finch *v.* Finch, 1882, 23 C. D. 267 (C. A.).

[5] See Re Birch, 1853, 358.

[6] See Castleden *v.* Castl 9 H. L. C. 186; Ogilvie 1868, 27 L. J. Ch. 541.

[7] See R. *v.* Bjornsen, L. J. M. C. 180.

[8] See, also, Lee *v.* 1869, L. R. 1 H. L. (Sc.)

[9] Bohun *v.* Delessert, 18 21; Man *v.* Ricketts, 1845, 255.

[10] R. *v.* Benson, 1810, 2 See, also, Cheney *v.* Cour 32 L. J. C. P. 116; and Re Ex parte Johnson, 1884, 338 (C. A.).

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§§ 144—145.

d, posted on its walls, is evidence whence a jury may at the placards had been printed and posted by the y of the commander;[1] on an indictment for bigamy, the solemnisation of the first marriage in a Wesleyan n the presence of the registrar, and of the entry of such e in his book, raises a primâ facie presumption that ɔel was duly registered;[2] and so also proof by a witness at it, that a marriage was solemnised in a parish church curate of the parish, renders it unnecessary to prove ıe registration of the marriage, or the fact of any licence been granted, or of any banns having been published;[3] constant performance of divine service from an early ı a chapel raises a primâ facie presumption that it has ly consecrated.[4]

. An Irish decision carried this presumption to its limit. There a shopkeeper (prior to the passing of the and Measures Act, 1878[5]) was prosecuted for using which were light when compared with the county l. Proof that the county standard had been compared imperial standard within the last five years, although mparison was expressly required by statute, was held sary, on the ground that the primâ facie presumption t the officials in charge of the local standards had ed their duty.[6]

Again, the court presumed the regularity of the ngs, and that the writ had in due course come to the hrough the coroner, on a motion to discharge out of a party detained for debt in the sheriff's gaol, made on nd of irregularity in the proceedings, although it did not hat a writ of ca. sa. at the suit of the sheriff, which was ands of the governor of the gaol, had ever been in the s hands, such writ having been set out in a return which

v. Nicolopulo, 1855, 24 321.
Mainwaring, 1858, 27 L. J. ; Sichel *v.* Lambert, 1864, C. P. 137; R. *v.* Cradock, & F. 837.
Allison, 1806, R. & R. 109.
rick *v.* Limerick, 1863, 32 L. J. P. & M. 22.

[4] Rugg *v.* Kingsmill, 1867, L. R. 1 Adm. & Ecc. 343; R. *v.* Cresswell, 1876, 1 Q. B. D. 446.

[5] 41 & 42 V. c. 49; amended by 52 & 53 V. c. 21.

[6] Hill *v.* Hennigan, 1877, Ir. R. 11 C. L. 522.

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§§ 145, 146.

the gaoler had made to a writ of habeas corpus previously together with a certificate by the coroner, that the cop writ was a true one.[1] The court has also presumed that certificate purporting to be granted by A, the only church and B, the only overseer of the parish, sixty years pre during which the appellant parish had submitted certificate, was regular, and that, by custom, there was churchwarden in the parish, and that two overseers h originally appointed, but that one of them was dead, vacancy not filled up at the date of the certificate;[2] it presumed in favour of the regularity of a parish inde apprenticeship, signed only by one churchwarden a overseer;[3] in favour of deeds of parish apprenticeshi where such a deed had been allowed by justices as requ the then law, it must be taken, in the absence of evidenc contrary, that notice had been duly given to the officer parish, where the apprentice was to serve;[4] that where deed, certified by the allowance of the justices, contained of the order of binding, no evidence of such order, bey indenture itself, is necessary;[5] and that where an appren served his time under a deed executed thirty years before was proved both that such deed was lost, and that the p which the pauper was settled under it had relieved him last twelve years, it must be presumed that the deed was stamped, though the stamp officers proved that it did not in their office that any such indenture had been stamped the last thirty-one years.[6]

§ 146. On this same principle of "omnia præsumun esse acta," every reasonable intendment will be made in

[1] Bastard *v.* Trutch, 1835, 3 A. & E. 451.

[2] R. *v.* Catesby, 1824, 2 B. & C. 814. See, also, R. *v.* Whitchurch, 1827, 7 B. & C. 573. From R. *v.* Upton Gray, 1830, 10 B. & C. 812, it appears that this presumption is rather one of *fact* than of *law*.

[3] R. *v.* Hinckley, 1810, 12 East, 361; R. *v.* Stainforth, 1845, 17 L. J. M. C. 25.

[4] R. *v.* Whiston, 1836, 4 A. & E. 607; R. *v.* Whitney, 1836, 5 A. & E. 191.

[5] R. *v.* Stainforth, 1845, M. C. 25. See, also, R. *v.* Magdalen, 1853, 23 L. J. R. *v.* Broadhempston, 1859, M. C. 18.

[6] R. *v.* Long Buckby, East, 45. Both this case a Catesby, 1824, 2 B. & C. above, partly rested on the tion of validity arising fr acquiescence. See ante, 131, 139.

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§§ 146, 147.

rder of justices, provided it appear on the face of the order e justices had jurisdiction.[1] But this rule does not extend ictions, which, as combining summary power with penal uences, are watched with peculiar vigilance, and construed rictness at least as great as indictments.[2] Still, even with to convictions, if the *authority* of the magistrate can be ly collected from the facts stated on the record, the court be *astute* in discovering irregularities in the proceedings. fest rule on the subject is that laid down by Lord Ellen-ı, that the court "*can* intend nothing in favour of ions, and *will* intend nothing against them,"[3] and the ion or order will be construed according to the very ge employed in it.[4]

7. Neither does the rule that "omnia præsumuntur ritè ta" apply, so as in any event to *give jurisdiction* to autho-cting judicially under a special statutory power; but in cases every circumstance required by the statute to give ction *must* appear on the face of the proceedings, either by averment, or by reasonable intendment.[5] There is no ion, in this respect, between convictions, commitments,[6] tions, warrants to arrest, examinations, or orders;[7] and r an order under a special Act be made by the Lord llor or by a justice of the peace, the facts which gave

. Morris, 1792, 4 T. R. 552; l *v.* Chadwick, 1847, 16 L. J. 43; R. *v.* Preston, 1848, 12 6; R. *v.* Stainforth, 1845, 17 C. 25.

. Morris, 1792, 4 T. R. 552; Saines, 1706, 2 Ld. Raym. 265; Fletcher *v.* Calthrop, L. J. Q. B. 49; R. *v.* Little, Burr. 613; R. *v.* Corden, Burr. 2281, where the court l that "a tight hand ought olden over these summary ons:" R. *v.* Pain, 1826, 5 251; R. *v.* Daman, 1819, 2 d. 378.

. Hazell, 1810, 13 East, 141. ey on Conv. 74—77.

. Helling, 1715, 1716, 1 Str. stie *v.* Unwin, 1840, 11 A. & In re Clark, 1842, 11 L. J. 5.

[5] R. *v.* All Saints, Southampton, 1828, 7 B. & C. 790 (Holroyd, J.); Gosset *v.* Howard, 1847, 16 L. J. Q. B. 345; R. *v.* Helling, 1715, 1716, 1 Str. 8; R. *v.* Totness, 1849, 18 L. J. M. C. 46; R. *v.* Hulcott, 1796, 6 T. R. 583, and note to § 147, infra.

[6] But a warrant of commitment which purports to be founded on a preceding conviction will be good, though it does not state that the evidence was given on oath, or in the presence of the prisoner: Ex parte Bailey and Ex parte Collier, 1854, 23 L. J. M. C. 161.

[7] Day *v.* King, 1836, 5 A. & E. 359; Brook *v.* Jenney, 1841, 11 L. J. M. C. 10; Johnson *v.* Reid, 1840, 9 L. J. M. C. 25; Gosset *v.* Howard, 1847, 16 L. J. Q. B. 345.

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§§ 147—148.

the authority must be stated.[1] A presumption that an astical Court will exceed its jurisdiction will not be mad the same principle the courts refuse to anticipate the de the master on a question of costs, as they cannot presu he will decide erroneously.[3]

§ 147A. The presumption under consideration is ig the case of highway rates. In such cases, although its rec would have been productive of much public advantage, duction of the official book, with the rate duly entered i allowed, does not even furnish at least primâ facie evide highway rate; and the fact that it has been duly publish still be proved by independent evidence.[4] With regard rates, however, it has been expressly enacted, that "the tion of the book purporting to contain a poor-rate, allowance of the rate by the justices, shall, if the rate is the form prescribed by law, be primâ facie evidence of making and publication of such rate."[5]

§ 148. The doctrine that "omnia præsumuntur ritè es is, in many instances, recognised in support of the sol of even *private* persons. For instance, if an act can lawful after the performance of some prior act, due perf of that prior act will be presumed.[6] Again, although, in of contracts not under seal, a consideration must in ge averred and proved, *bills of exchange* and promissory n primâ facie presumed to be founded on valuable consid this latter presumption being made partly because it is in to preserve the negotiability of such instruments int partly because the existence of a valid consideration may ably be inferred from the solemnity of the instruments the and the deliberate mode in which they are executed

[1] Christie *v.* Unwin, 1840, 11 A. & E. 373.

[2] Chesterton *v.* Farlar, 1838, 7 A. & E. 713; Hall *v.* Maule, 1838, 7 A. & E. 721; Hallack *v.* U. of Cambridge, 1841, 1 Q. B. 593.

[3] Head *v.* Baldry, 1838, 8 A. & E. 605.

[4] Bird *v.* Adcock, 1878, 47 L. J. M. C. 123.

[5] "The Poor Rate Assessment and Collection Act, 1869" V. c. 41), § 18.

[6] Knox County *v.* Neath Bank, 1893, 147 U. S. 91.

[7] Collins *v.* Martin, 179 P. 651; Holliday *v.* Atkin 5 B. & C. 501; Story, Bil 178. See ante, § 86; Bil change Act, 1882 (45 & 46 s. 30, sub-s. 2, s. 29, sub-s.

[8] Story, Bills, §§ 16, 178

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§§ 148, 149.

ng are further examples of presumptions: if secondary
ce be tendered to prove the contents of an instrument
lost or detained by the opposite party after notice to pro-
, it will be presumed that the original was duly stamped,
some evidence to the contrary, as, for example, that it
stamped when last seen,[1] can be given;[2] under the Leases
les of Settled Estates Act, 1877, the execution of a lease
lessor furnishes sufficient presumptive evidence that the
rpart has been duly executed by the lessee;[3] where lands
lly leasehold have been dealt with as freehold for a long
by persons in possession, as between parties claiming
such persons, a presumption will be raised that the rever-
s been got in;[4] in the absence of all proof as to which of
eds of even date was first executed, the court will presume
ur of that order of priority which will best support the
ntent of the parties;[5] and where an act has been done
oint stock company to the legality of which certain
ties are requisite, and the circumstances are such that
cence may be imputed to the shareholders, a compli-
th the necessary formalities will, as against the company,
umed.[6]

9. On the same principle, where the *attestation* of a *deed*
n in the usual form,[7] and the signature of the party has
roved, the jury will be advised to presume a due sealing
ivery, and that, too, in cases where the attesting witness
nied all recollection of any other form having been gone
n beyond the mere signing.[8] Indeed, it is not necessary,

ine Investment Co. *v.* Havi-
2, L. R. 5 H. L. 624.
v. Hart, 1842, 11 L. J. Ch.
ther *v.* Solomons, 1848, 18
P. 92; Pooley *v.* Goodwin,
A. & E. 94; Crisp *v.* Ander-
5, 1 Stark. 35; R. *v.* Long
1805, 7 East, 45; Clos-
v. Carrel, 1856, 25 L. J.
6. See Arbon *v.* Fussell,
N. R. 31; Connor *v.* Cronin,
Ir. L. R. 480; Herbert *v.*
62, 13 Ir. Eq. R. 25; 33 &
46, § 58, Ir.
41 V. c. 18, § 48.
nes *v.* Milward, 1878, 47 L. J. Ch. 522.

[5] Taylor *v.* Horde, 1757, 1 Burr. 107. See R. *v.* Ashburton, 1846, 8 Q. B. 876; Gartside *v.* Silkstone, &c., Co., 1882, 21 Ch. D. 762.

[6] Grady's case; Re the British Prov. Life and Fire Ass. Soc., 1863, 32 L. J. Ch. 326; Lane's case, 1863, 33 L. J. Ch. 84.

[7] As to presumption in favour of a will having a due attestation clause, see post, § 1056.

[8] Fasset *v.* Brown, 1790, Peake, R. 33; Grellier *v.* Neale, 1790, Peake, R. 198; Talbot *v.* Hodgson, 1816, 7 Taunt. 251; Hall *v.* Bain-

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§§ 149, 150.

to constitute a valid sealing, that an impression should with wax or with a wafer, but an impression made in i wooden block will suffice ;[1] and even though no impress appear on the parchment or paper, still, if the instrumen to be a deed, is on proper stamps, and be stated in the a to have been duly sealed and delivered, it will, in the a evidence to the contrary (especially if it be an ancien ment),[2] be presumed to have been sealed.[3] Eviden contrary will, however, be afforded where a bond, be trace of any seal, and referring to contemplated test dispositions which are to supersede it, is found among t of the *obligor*.[4] And a transfer which bears upon it circle, and within such circle the words "Place for s bears no actual seal, is not a deed merely because its a clause says it was "signed, *sealed*, and delivered."[5] B executed by a corporate body need not have the corp affixed to it, but the corporation may *adopt* any *private* please for the occasion, and the jury may presume tha of the adopted seal was a corporate act, if the instrumen to be executed by the head and the subordinate membe corporation "under their seal."[6]

§ 150. In accordance, again, with the maxim, "omn muntur ritè esse acta," every man is, in the absence o to the contrary, presumed to know the contents of any d he executes,[7] and to be bound by it. It is, however, e 13 Eliz. c. 5,[8] that all conveyances of lands or chatte are not made for a valuable consideration and bonâ fide

bridge, 1848, 17 L. J. Q. B. 317; Burling *v.* Paterson, 1840, 9 C. & P. 570; Davidson *v.* Cooper, 1843, 12 L. J. Ex. 467. See, also, Doe *v.* Lewis, 1836, 7 C. & P. 574; Doe *v.* Burdett, 1843, 4 A. & E. 1; Newton *v.* Ricketts, 1861, 8 H. L. C. 260; and Burnham *v.* Bennett, 1847, 1 De G. & Sm. 513. This presumption was formerly treated as one of law, but is now considered one of fact, and left to the jury.

[1] R. *v.* St. Paul's, Covent Garden, 1845, 7 Q. B. 232.

[2] Crawford and Lindsay Peer., 1848, 2 H. L. C. 534.

[3] In re Sandilands, 18 C. P. 411; R. *v.* St. Pa Garden, 1845, 7 Q. B. 23

[4] Re Smith, Oswell *v* 1892, 67 L. T. 64 (C. A.).

[5] Re Balkis Co., 188 300.

[6] Jones *v.* Galway Tow 1847, 11 Ir. L. R. 435.

[7] In re Cooper, 1882, 611.

[8] Made perpetual by c. 125, and amended by Revision Act, 1888 (51 V

[9] See In re Ridler, Ridl 1882, 22 Ch. D. 74 (C. A.

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§§ 150, 150a.

against any person, including the Crown, whose claims original owner of the property shall be thereby delayed or ed.[2] Whenever, therefore, any transaction is sought to alidated under this Act, the purchaser must both establish tice of his title, and show affirmatively, not only that the nder which he claims was duly executed, but that it was n perfect good faith, and also for a valuable, as contra- uished from a mere good consideration.[3] In determining estion of bona fides, the jury will take into consideration circumstances connected with the transfer. If, therefore, nveyance be absolute, and pass to the vendee an immediate of possession, the fact of the vendor being allowed to ue as the apparent owner of the property naturally a very strong presumption of fraud.[4] If, indeed, the ance or bill of sale is by way of mortgage, and the gee is not to take possession till a default in pay- of the mortgage money, then, as the nature of the tion does not call for any change of possession, the e of such change will not of itself furnish any evidence usion.[5]

150A. Bills of sale of personal chattels given by way of y for the payment of money are, moreover, now rendered nder the Bills of Sale Act, 1882, unless they set forth the eration for which they were given,[6] as also under the Bills Act, 1878,[7] are all bills of sale as against trustees in bank- of the grantor, sheriffs' officers, &c., in respect of chattels

w *v.* Bran, 1816, 1 Stark. 319; od *v.* Wilkes, 1833, 6 C. & P. erkins *v.* Bradley, 1842, 1 19. See Whitaker *v.* Wisbey, L. J. C. P. 116. Freeman *v.* Pope, 1870, L. R. 06; 5 Ch. App. 538; Crossley rthy, 1871, L. R. 12 Eq. 158; *v.* Clark, 1872, L. R. 14 Eq. ent *v.* Riley, 1872, L. R. 14 ; Golden *v.* Gilham, 1882, D. 389 (C. A.).; Ex parte Re Butterworth, 1882, 19 588 (C. A.). yne's case, 1602, 3 Co. Rep. rtindale *v.* Booth, 1832, 3 B. & Ad. 498; Lindon *v.* Sharp, 1843, 6 M. & Gr. 898.

[5] Martindale *v.* Booth, 1832, 3 B. & Ad. 498.

[6] 45 & 46 V. c. 43, § 8; 42 & 43 V. c. 50, § 8, Ir. As to what is a sufficient compliance with this rule, see Ex parte Firth, Re Cowburn, 1882, 19 Ch. D. 419; Hamlyn *v.* Betteley, 1880, 5 C. P. D. 327; Hamilton *v.* Chaine, 1881, 7 Q. B. D. 319 (C. A.).; Ex parte Rolfe, Re Spindler, 1881, 19 Ch. D. 98 (C. A.).; In re Wiltshire, Ex parte Eynon, [1900] 1 Q. B. 96; Davies *v.* Jenkins, [1900] 1 Q. B. 133.

[7] 41 & 42 V. c. 31, § 8.

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§§ 150a, 151.

comprised therein which have remained in the poss
apparent possession of the grantor.

§ 151. Notwithstanding the maxim, "omnia præ
ritè esse acta," whenever any person by donation derive
under a deed to the prejudice of another person,[1]—and
especially so, if any confidential or fiduciary relatio
between the parties,—the courts so far presume ag
validity of the instrument as to require some proof (v
amount according to circumstances) of the absence of
approaching to imposition, over-reaching, undue infl
unconscionable advantage.[2] For example, a deed o
other disposition of property, except a will,[3] made in fa
solicitor,[4] or a relation of the solicitor,[5] by a client, of
attendant by a patient,[6] of a parson by one of his cong
of a "spiritual medium" by one of his dupes,[8] of a tru
beneficiary,[9] of an executor by a legatee,[10] of a guar
ward, of a parent by a child,[11] of a husband by a w
agent by a principal,[12] or of a shrewd man of busin
infirm ignorant old woman,[13] will be regarded wit
suspicion, and the instrument will be set aside as co

[1] Cooke *v.* Lamotte, 1851, 21 L. J. Ch. 371. See Coutts *v.* Acworth, 1869, L. R. 8 Eq. 558.

[2] 1 Story, Eq. Jur. §§ 308—323. See Baker *v.* Bradley, 1856, 25 L. J. Ch. 7.

[3] Parfitt *v.* Lawless, 1872, L. R. 2 P. & D. 462 See Ashwell *v.* Lomi, 1850, L. R. 2 P. & D. 477.

[4] Gresley *v.* Mousley, 1859, 28 L. J. Ch. 620; O'Brien *v.* Lewis, 1863, 32 L. J. Ch. 569; Gardener *v.* Ennor, 1866, 35 Beav. 549; M'Pherson *v.* Watt, 1877, 3 App. Cas. 254 (H. L.); Liles *v.* Terry, [1895] 2 Q. B. 679 (C. A.). As to the time during which this presumption exists, and the evidence necessary to rebut it, see Wright *v.* Carter, [1903] 1 Ch. 27 (C. A.).

[5] Barron *v.* Willis, [1902] A. C. 271 (H. L.).

[6] Mitchell *v.* Homfray, 1881, 8 Q. B. D. 587 (C. A.); Dent *v.* Bennett, 1858, 4 Myl. & Cr. 269.

[7] Nottidge *v.* Prince, 1860, 29 L. J. Ch. 857; Huguenin *v.* Baseley, 1807, 14 Ves. 273.

[8] Lyon *v.* Home, 186 Eq. 655.

[9] Luff *v.* Lord, 1864 220.

[10] Gray *v.* Warner, 18 Eq. 577.

[11] Wright *v.* Vanderp 25 L. J. Ch. 753; Ba Browne, 1881, 18 Ch. Hartopp *v.* Hartopp, L. J. Ch. 471; Dimsda dale, 1856, 25 L. J. Ch. *v.* Oppenheim, 1859, 26 Davies *v.* Davies, 1863, 2 (Stuart, V.-C.); Potts *v.* 34 Beav. 543; Turner *v.* C L. R. 7 Ch. 329 (C. A.) *v.* Addison, 1899, 80 (C. A.).

[12] King *v.* Anderson, 8 Eq. 147.

[13] Baker *v.* Monk, 186 419; Summers *v.* Griffit Beav. 27; Slator *v.* N Ir. R. 11 Eq. 367.

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§§ 151—153.

the person benefited will have thrown upon him the of establishing beyond all reasonable doubt the perfect and honesty of the entire transaction.[2]

. An attempt was made in Ireland to apply this doctrine e in which a woman had, while living in adultery with a man, assigned some of her property to secure a debt y her paramour, and afterwards applied to the Court of y to set aside the assignment on the ground of undue e. It was held, however, that the doctrine in question y applicable when some lawful relation existed between ies.[3]

. The old Court of Chancery used to look with peculiar n heirs apparent and other expectant heirs, who entered otiations as to their expectancies.[4] Every person who ith an expectant heir for his reversion had, if the ion were subsequently disputed, the burthen of proof upon establish its entire fairness.[5] At the instance of some nt lawyers,[6] an Act passed in December, 1867, enacts, o purchase made bonâ fide, and without fraud or unfair of any reversionary interest in real or personal estate, reafter be opened or set aside merely on the ground of alue."[7] It will be noted that this enactment is carefully

on *v.* Judge, 1855, 23 L. J. This was the case of a deed a client to his solicitor.
y, Eq. Jur. §§ 308—323; Atkins, 1832, 3 Myl. & K. dby *v.* Nedby, 1852, 21 446; Hoghton *v.* Hoghton, L. J. Ch. 482; Grosvenor *v.* 1860, 28 Beav. 659; Savery 856, 25 L. J. Ch. 482 (H. L.); Lake, 1852, 22 L. J. Ch. lage *v.* Southee, 1852, 21 472. See Price *v.* Price, L. J. Ch. 53; Toker *v.* 863, 32 L. J. Ch. 322; *v.* Mullings, 1871, L. R. 7 C. A.); King *v.* Anderson, R. 8 Eq. 147 625. See Johnston, 1882, 19 Ch. D. to the nature of the in- t advice required in cases ture, see Powell *v.* Powell, Ch. 243, and Wright *v.* 903] 1 Ch. 27. As to the law when the person to be benefited is a money-lender seeking to enforce his security, see the Money-lenders Act, 1900 (63 & 64 V. c. 51).

[3] Hargreave *v.* Everard, 1856, 6 Ir. Ch. R. 278.

[4] Bromley *v.* Smith, 1859, 29 L. J. Ch. 18; Ld. Portmore *v.* Taylor, 1831, 9 L. J. Ch. 203; Davies *v.* D. of Marlborough, 1818, 2 Swans. 108; Sharp *v.* Leach, 1862, 31 Beav. 491; Croft *v.* Graham, 1863, 2 De G. J. & Sm. 155; Perfect *v.* Lane, 1861, 31 L. J. Ch. 489; Benyon *v.* Fitch, 1866, 35 Beav. 570.

[5] See cases cited in last note.

[6] See Webster *v.* Cook, 1867, L. R. 2 Ch. 542 (C. A.). Sed qu. the cases cited above, § 151, appear to show that the existence of a legal relationship between the parties is not necessary to raise this presumption.

[7] 31 V. c. 4, § 1. See Miller *v.* Cook, 1870, L. R. 10 Eq. 641; Tyler

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§§ 153—155.

limited to purchases "made bonâ fide and without unfair dealing," and it not only leaves untouched the la governs unconscionable bargains, but allows under-va still regarded by the court as a material element in cas fraud is charged.[1]

§ 154. It is a presumption that a tenant for life, person having a partial interest in settled estates, who an incumbrance upon them, intends to keep the charg against the inheritance for his own benefit.[2] This pres however (on technical rather than on substantial gr inapplicable to a case where a tenant for life pays off debts of the settlor.[3] Neither does it extend to the charge bearing interest, where,—the rents and profi estate having been insufficient to meet the interest,—t for life has paid the balance of it out of his own pocke having warned the remainderman of his intention to c excess of his payments on the inheritance.[4]

§ 155. Certain presumptions are also recognised as to *institutions*, and in interpreting charitable grants. Th charity be founded to support a religious establishm promote religious education, and the intentions of th be not clearly expressed, the primâ facie presumptio that he intended to support an establishment belongin particular form of religion, or to promote the teaching particular doctrine; next, that the form of religion o contemplated was that which he himself had profe lastly, if no evidence be adduced of his entertaining religious views, that the established religion of the co the one meant to be supported. If, however, the ch founded for purposes of mere secular education, or one of a purely eleemosynary character, the court, in th of any expressed intention to the contrary, will presur

v. Yates, 1871, L. R. 11 Eq. 265, L. R. 6 Ch. 665; Judd *v.* Green, 1876, 45 L. J. Ch. 108.

[1] Ld. Aylesford *v.* Morris, 1873, L. R. 8 Ch. 490; Beynon *v.* Cook, 1875, L. R. 10 Ch. 389 (C. A.). See, also, Nevill *v.* Snelling, 1880, 15 Ch. D. 679; O'Rorke *v.* Bolingbroke, 1877, 2 App. Cas. 814. See, too, Gen., ch. xxv. vv. 29—34

[2] Morley *v.* Morley a *v.* Morley, 1855, 25 L. J. post, § 176A.

[3] Id. See Roddam 1857, 25 L. J. Ch. 329; 438.

[4] Ld. Kensington *v* 1859, 29 L. J. Ch. 537 (I

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§§ 155—158.

are intended to be shared by all persons, whatever their s opinions.[1]

. It is also now presumed (contrary to what was once red to be the law) that an estate for life without impeach- waste does not confer upon the tenant for life any legal commit "*equitable waste*," unless an intention to confer ght expressly appears in the instrument creating the estate.[2]

. The presumptions, or, rather, the rules of construction, sed in equity with respect to *joint tenancy* are "not very hensible."[3] If two persons jointly advance money *on e* a mere tenancy in common will be created, though the y be conveyed to them as joint tenants, because the law es that men will not willingly speculate with money hey lend.[4] But, on the other hand, if two persons jointly e money *as purchasers*, and the sums paid by each be a joint tenancy will be established, because here it is ed that men will readily gamble as to survivorship with to property which they buy.[5] If, however, two persons a purchase, and one of them advances more of the se-money than the other, even though the deed does not the words "equally to be divided," there will be no rship.[6]

. The existence of some mistake in it will not be ed from the absence from a voluntary settlement of a f revocation. The circumstance will, however, generally n into account, as entitled to weight, in deciding on the of the instrument.[7] Parties relying upon an irrevocable ry settlement ought, therefore, to be prepared to prove e settlor was properly advised when he executed it, that roughly understood the effect of omitting the power, and intended to omit it.[5]

Gen. *v.* Calvert, 1857, 26 . 682.
37 V. c. 66 ("The Supreme Judicature Act, 1873"), -sect. 3; 40 & 41 V. c. 57, -sect. 3, Ir.
Harrison *v.* Barton, 1861, Ch. 215, and the remarks Wood, V.-C.
v. Styward, 1632, 1 Eq. Cas. Abr. 290.
[5] Rigden *v.* Vallier, 1751, 2 Ves. Sen. 252.
[6] Hall *v.* Hall, 1873, L. R. 8 Ch. 430 (C. A.); Phillips *v.* Mullings, 1874, L. R. 7 Ch. 244 (C. A.). See also Welman *v.* Welman, 1880, 15 Ch. D. 570.
[7] Id.

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§§ 159, 160.

§ 159. It is, in the absence of any express stipulati
contrary, since the 1st of August, 1870, presumed, t
rents, annuities,"—which term includes salaries and p
—"dividends,[2] and other periodical payments, in the
income, whether reserved or made payable under an in
in writing or otherwise," accrue from day to day, like in
money lent, and are apportionable in respect of time acc
The statute providing this extends to wills, which
executed before its passing, have come into operation
date.[4]

§ 160. *There exist the following presumptions* with r
the *execution, alteration,* and *revocation of wills:*[5]—
proof of signature of the deceased, he will be presume
known and approved of the contents and effect of the in
he has signed;[6] such knowledge and approval being es
the validity of the will.[7] This presumption, however
to be rebutted by showing any suspicious circun
Therefore, if the testator, from want of education, or fr
infirmity, was unable to read,[9] or if his capacity at th
executing the instrument is a matter of doubt;[10] or if

[1] Treacy *v.* Corcoran, 1874, Ir. R. 8 C. L. 40; 33 & 34 V. c. 35 ("The Apportionment Act, 1870"), § 5.

[2] See In re Griffith, Carr *v.* Griffith, 1879, 12 Ch. D. 655.

[3] 33 & 34 V. c. 35, §§ 2, 7. See, also, 4 & 5 W. 4, c. 22 ("The Apportionment Act, 1834"). See Jones *v.* Ogle, 1873, L. R. 8 Ch. 192 (C. A.). See, also, Capron *v.* Capron, 1874, L. R. 17 Eq. 288; Re Cline's Estate, 1874, L. R. 18 Eq. 213; Pollock *v.* Pollock, 1874, L. R. 18 Eq. 329; Hasluck *v.* Pedley, 1875, L. R. 19 Eq. 271; Daly *v.* Att.-Gen., 1870, Ir. R. 8 Eq. 595; Re Cox's Trusts, 1878, 9 Ch. D. 159; Swansea Bk. *v.* Thomas, 1879, 4 Ex. D. 94.

[4] Constable *v.* Constable, 1879, 11 Ch. D. 681. The Act applies where a tenant for life dies after its passing, but the testator, under whose will he took, died before that date: Lawrence *v.* Lawrence, 1884, 26 Ch. D. 795.

[5] As to presumption in favour of the due acknowledgment of a will appearing on the face of it to have been properly executed, § 1056. For other pr respecting wills made pr Jan., 1838, see the early this work, §§ 131—134.

[6] Billinghurst *v.* Vic 1 Phillim. 191; Fawcett 1810, 3 Phillim. 476; Gu Blackburn, 1866, L. R. 109; Wheeler *v.* Alderso Hagg. Ecc. 587; Brownin 1848, 6 Moo. P. C. C. 430.

[7] Hastilow *v.* Stobie, 1 1 P. & D. 64; Wilde, J ruling a dictum of Cress in Middlehurst *v.* Johnso L. J. P. & M. 14. See Cleare, 1869, L. R. 1 P. &

[8] Von Stentz *v.* Comy Ir. Eq. R. 622, 642.

[9] Barton *v.* Robins, Phillim. 455, *n.*; In 1862, 31 L. J. P. & M. Wray, 1876, Ir. R. 10 Eq see Longchamp *v.* Fish, 18 415.

[10] 1 Phillim. R. 193; Wyatt, 1828, 1 Hagg.

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materially benefited by the will has prepared it, or d its execution, or has been in a position calculated to undue influence;[1] or if the instrument itself is not nt to the testator's natural affections and moral duties;[2] re rigid investigation will take place, and probate will y not be granted, unless the court be satisfied by that the paper propounded really does express the l of the deceased.[3] In all cases the onus of proving ntary capacity is on the person relying on the will, and ence must be "sufficient to prove affirmatively that the was of sound mind when he executed it."[4] In cases of inary suspicion, it will be highly expedient to prove at instructions were given by the deceased corresponding actual provisions of the will, or that the instrument the time of execution, read to or by the testator, or that expressed some subsequent knowledge and approval of positions; but this precise species of evidence is not ly required, and it will be sufficient if, by *any* means a knowledge and approval of the contents of the will rought home to the deceased.[5] Where the testamentary of the testator is in question, the reports of "Chancery" as to the state of mind of the testator cannot be put nce.[6]

Secondly, where proof can be furnished that, prior to ution of a will by a competent testator, it was either read

Meech, 1828, 1 Hagg. Ecc. aur *v.* Croft, 1840, 3 Moo. 47.

ell *v.* Thomas, 1847, 6 Moo. 37; Scouler *v.* Plowright, Moo. P. C. C. 440, 444; *v.* Marriott, 1833, 1 Myl. & Greville *v.* Tylee, 1851, 7 C. C. 320; Paske *v.* Ollat, Phillim. 324; Zacharias *v.* 0, 3 Phillim. 202; Wheeler n, 1831, 3 Hagg. Ecc. 587; rst *v.* Vickers, 1810, 1 187; Fulton *v.* Andrews, R. 7 H. L. 461; Durling *v.* 1839, 2 Curt. 226; *v.* Wood, 1848, 2 Notes of c. & Mar. 485; Paine *v.* 2, 18 Ves. 475; O'Connel 1819, Milw. Ir. Ecc. 102; Gore *v.* Gahagan, 1819, Milw. Ecc. Ir. 220.

[2] See Prinsep and E. India Co. *v.* Dyce Sombre, 1832, 10 Moo. P. C. C. 285.

[3] Browning *v.* Budd, 1848, 6 Moo. P. C. C. 430; Fulton *v.* Andrew, 1875, L. R. 7 H. L. 448.

[4] Symes *v.* Green, 1859, 1 Sw. & Tr. 401; Sutton *v.* Sadler, 1857, 3 C. B. (N.S.) 87.

[5] Barry *v.* Butlin, 1838, 2 Moo. P. C. C. 482; Mitchell *v.* Thomas, 1847, 6 Moo. P. C. C. 137. See further, on this subject, 1 Will. on Ex. 97, 311, 312; and Atter *v.* Atkinson, 1869, L. R. 1 P. & D. 665.

[6] Roe *v.* Nix, [1893] P. 55.

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§§ 161—164. over to him, or otherwise brought specially to his r Probate Division will, in the absence of fraud, not c primâ facie, that he approved of the contents, but will a *conclusive* presumption to that effect. No matter wha may be forthcoming to establish a case of obvious e show that some passage has crept into the instrument mistake of the draughtsman, the judge will turn a all such testimony.[1] Where, however, the jury foun both that a certain word had been introduced into th blunder, and that the clauses in which it appeared been brought to the notice of the testator in any way directed that the obnoxious expression should be str the instrument wherever it occurred.[2]

§ 162. *Thirdly*, in the absence of direct proof, wh sheets of paper, constituting a connected disposal of are found together, the last only being duly signed ar as a will, it will (even in spite of partial inconsistencie of the provisions) be presumed that each of the sheet formed a part of the will at the time of its execution.[3]

§ 163. *Fourthly*, it is, in favour of attestations presumed that if a testator *might* have seen the fact, *did* see the witnesses subscribe their names.[4] T his having been in the same room with them is p evidence of their attestation in his presence, while an not made in the same room is primâ facie not ma presence.[5]

§ 164. *Fifthly*, in the absence of any evidence to the the law presumes that all *alterations*, *interlineations*, o which may appear on the face of a will, were mad

[1] Guardhouse *v.* Blackburn, 1866, L. R. 1 P. & D. 109; Harter *v.* Harter, 1872, L. R. 3 P. & D. 11 (Sir J. Hannen). Sed qu., for the judicial reasoning in these cases is not so logical as might fairly be expected. See In re Oswald, 1874, L. R. 3 P. & D. 162, and the judgment of Cairns, L.C., in Fulton *v.* Andrew, L. R. 7 H. L. 448.

[2] Morrell *v.* Morrell, 1882, 7 P. D. 68.

[3] Marsh *v.* Marsh, 1860, 30 L. J. P. & M. 77; Gregory Proctor, 1846, 4 Notes of & Mar. 620; Rees *v.* L. R. 3 P. & D. 84. See Cattrall, 1863, 33 L. J. P

[4] Todd *v.* Ld. Winch 2 C. & P. 488; Doe *v* 1814, 1 M. & Selw. 294. § 1054.

[5] Neil *v.* Neil, 1829, 18 R. 6, 10 (Am.). And se Seaton, 1901, 85 L. T. 76

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on,[1] and even after the execution of any codicils thereto.[2] uently the Probate Division of the High Court will, in a unexplained alteration, interlineation,[3] or erasure, only robate of the will in its original form.[4] This presump- owever,—which is contrary to that which prevails with to deeds,[5] resolutions, and other official documents,[6]— rebutted by slight affirmative evidence,[7] such as a state- the attestation clause that a will had been executed "with lterations."[8] And it will not apply at all to the *filling up s*. Therefore, where a testator gave instructions that his ould be prepared with blanks for the amount of the s, and after his death the will was found regularly d, with the amounts filled up in his own handwriting, it the absence of all evidence on the subject, presumed e blanks were filled up before the will was signed, since ise the execution would have been a mere idle ceremony.[9]

5. *Sixthly*, if a will, traced to the possession of the testator, t seen in his custody, be not forthcoming on his death, a ption is made under ordinary circumstances, and unless

monds *v.* Rudall, 1850, 1 Sim. 15, 136; Doe *v.* Catomore, 0 L. J. Q. B. 728; Doe *v.* 1851, 20 L. J. Q. B. 367; tone James, 1858, 1 S. & T. illiams *v.* Ashton, 1860, 1 115.

hington *v.* Onslow, 1848, 6 Cases, Ecc. & Mar. 183, 188. o, Christmas *v.* Whinyates, 2 L. J. P. & M. 73. e White, 1861, 30 L. J. P. & But see In re Cadge, 1868, P. & M. 15.

n *v.* Gregory, 1853, 22 L. J. 9; Cooper *v.* Bockett, 1863, P. C. C. 419; Greville *v.* 1851, 7 Moo. P. C. C. 320; Iardy, 1861, 30 L. J. P. & M. A curious instance of this d lately. A will was found ieces of paper stating the s of certain legacies pasted These were presumed to en made since execution, and dmitted to probate. At that e original figures, underneath ces so pasted on, could not be they were also not admitted to probate. About twenty years afterwards it was found that these original figures were legible, and the probate was amended by inserting them: Ffinch *v.* Combe, [1894] P. 191. See Rules for Reg. of Ct. of Prob. in Non-contentious Business, Nos. 8—10.

[5] Simmonds *v.* Rudall, 1850, 1 Sim. (N.S.) 115, 136; Doe *v.* Catomore, 1851, 20 L. J. Q. B. 728.

[6] Steevens's Hospital *v.* Dyas, 1863, 15 Ir. Ch. R. 405.

[7] See Dench *v.* Dench, 1878, 2 P. D. 60; In re Duffy, 1871, Ir. R. 5 Eq. 506; and In re Sykes, 1873, L. R. 3 P. & D. 26; Moore *v.* Moore, 1871, Ir. R. 6 Eq. 166. The presumption, moreover, has been altogether set at nought in the case of a will made by an officer in actual military service: In re Farquharson *v.* Tweedale, 1875, L. R. 3 P. & D. 204. Sed qu.

[8] Doherty *v.* Dwyer, 1890, 25 L. R. Ir. 297.

[9] Birch *v.* Birch, 1848, 6 Notes of Cases, Ecc. & Mar. 581; Greville *v.* Tylee, 1851, 7 Moo. P. C. C. 320.

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§ 165. there be sufficient evidence to rebut it, that such will destroyed by the testator, animo cancellandi.[1] But the tions of a testator, whether written or oral, and whet before or at or after[2] the execution of the instrument cases furnish cogent proof of his intentions.[3] Where, h will was produced, although it showed upon the fac intention of the testatrix to cancel it, such cancellation in the form required by the Wills Act, evidence of st made by the testatrix was held inadmissible to prove had executed the will in duplicate, and had destroyed copy animo cancellandi.[4] Again, the finding of the w the testator's papers, with the signature cut out, presumption that the mutilation was effected intenti the testator himself; and the will cannot be regarded a though the signature has been again attached by gu original place, and the document, when discovered, wa condition.[5] In the event, moreover, of a testator havin insane after the will was made, the burthen of provi was destroyed by him while of sound mind lies upon who sets up the revocation.[6] The revocation of a the testator was at one time considered to raise a pri though by no means a conclusive, presumption that th intended to revoke every codicil to it,[7] but this presun

[1] Sugden *v.* Ld. St. Leonards, 1876, 1 P. D. 154 (C. A.); Welch *v.* Phillips, 1856, 1 Moo. P. C. C. 299, 302; Finch *v.* Finch, 1867, L. R. 1 P. & D. 371; Johnson *v.* Lyford, 1868, L. R. 1 P. & D. 546; Podmore *v.* Whatton, 1864, 33 L. J. P. & M. 143; Dickinson *v.* Stidolph, 1861, 11 C. B. (N.S.) 341, 357; Brown *v.* Brown, 1858, 27 L. J. Q. B. 173; In re Brown, 1858, 27 L. J. P. & M. 20; Wood *v.* Wood, 1867, L. R. 1 P. & D. 309; Cutto *v.* Gilbert, 1854, 9 Moo. P. C. C. 143; Allan *v.* Morrison, [1900] A. C. 604 (P. C.).

[2] Sugden *v.* Ld. St. Leonards, 1876, 1 P. D. 154, overruling Quick *v.* Quick, 1864, 33 L. J. P. & M. 146.

[3] Whiteley *v.* King, 1854, 17 C. B. (N.S.) 756; Keen *v.* Keen, 1873, L. R. 3 P. & D. 105; Sugden *v.* Ld. St. Leonards, 1876, 1 P. D. also, Saunders *v.* Saunde Notes of Cases, Ecc. & Williams *v.* Jones, 1849, Cases, Ecc. & Mar. 106; Poulton, 1858, 27 L. Eckersley *v.* Platt, 1866, & D. 281.

[4] Atkinson *v.* Morris, [1 (C. A.).

[5] Bell *v.* Fothergill, 18 P. & D. 148.

[6] Sprigge *v.* Sprigge, 18 P. & D. 608.

[7] Grimwood *v.* Cozens, T. 364; In re Dutton, 186 P. & M. 137; Medlycott *v* 1824, 2 Add. 229; Clo Walcot, 1847, 5 Notes of & Mar. 523. But see In 1864, 33 L. J. P. & M. 27 Jobling, 1869, L. R. 1 P.

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§§ 165—167.

prevails; and now a codicil (however dependent it may be will) can only be revoked in one of the methods prescribed Wills Act.[1]

. With regard to *gifts in wills*, the following presumptions It is, in the absence of any distinct intimation to the y, presumed that every testator considers his estate nt to answer the purposes to which he has by his will it. Consequently, in the event of any deficiency arising assets, all annuities and legacies will, primâ facie, be held e rateably. In all cases the onus lies upon those who ny priority to furnish conclusive proof from the language ed, that the testator intended the bequests not to stand equal footing.[2] Again, it is primâ facie presumed that y specifically bequeathed or devised was intended by the to pass to the legatee or devisee in its entirety; and this ption will not be rebutted by a codicil, charging certain ary legacies on *all* the testator's estates, both real and al.[3] If, too, an annuity be bequeathed by will for an ite period, the law will presume, in the first instance, that intended to be given for the life of the annuitant; but resumption is liable to be rebutted by proof that the has used words which indicate an intention that the should be granted, either in perpetuity, or for a fixed of years.[4]

7. It is likewise primâ facie presumed that a legacy thed to a person, who is also named in the will as an or, was given to him in that character, and consequently person decline to accept the office, he must relinquish the unless he can show, from the language employed, that uest was made to him independently of his character of or, and solely as a token of personal regard.[5] When, too,

Turner, 1872, L. R. 2 P. & D.

er *v.* Huddlestone, 1851, 21 . 1; Brown *v.* Brown, 1836, 275; Thwaites *v.* Foreman, Coll. 409, 414; Dunboyne *v.* , 1854, 18 Beav. 313.
ron *v.* Conron, 1858, 7 H. L. C.
mpbell *v.* M'Conaghey, 1870, Eq. 20.

[4] Yates *v.* Maddan, 1851, 21 L. J. Ch. 24; Lett *v.* Randall, 1860, 30 L. J. Ch. 110; Stokes *v.* Heron, 1845, 12 C. & F. 161 (H. L.); Potter *v.* Baker, 1850, 21 L. J. Ch. 11; Blewitt *v.* Roberts, 1841, 10 L. J. Ch. 342; Hill *v.* Ratley, 1862, 31 L. J. Ch. 380; Sullivan *v.* Galbraith, 1870, Ir. R. 4 Eq. 582.

[5] Stackpole *v.* Howell, 1807, 13

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§§ 167, 168.

under the terms of a will, the consent of executors or t rendered necessary to the validity of any act, the law p in the absence of any express direction on the subject, discretionary power should be exercised by those only wh take the duties of the office;[1] and an executor or trus even without any formal renunciation or disclaimer, d accept the office or to act in the trusts, thereby relieves t interested from the responsibility of obtaining his cons also is presumed, in the absence of evidence of intenti contrary, when executors are appointed, and the residu is undisposed of, that the executors are trustees for th kin;[3] and that if there be no next of kin (as where th is illegitimate), that they may retain the property for use instead of its becoming forfeited to the Crown.[4] sumptions of law with regard to emblements[5] are capricious;[6] for it is presumed that the personal repres of a man dying seised in fee of land are entitled to th ments in preference to the heir, but where there is a the land, that the testator intended them to pass to such This capricious presumption may be rebutted by a specifi of the growing crops, or "farming stock,"[8] to anoth but the title of the devisee to them will not be ousted b disposition of all the testator's personal estate.[9]

§ 168. There is a primâ facie presumption that the terms, when used in wills, bear the following meanin word "children" is limited—as it also is when employ Statute of Distributions,[10]—to such children as are l according to the law of England; and this presumptio

Ves. 421; In re Reeve's Trusts, 1877, 4 Ch. D. 841; Harrison *v.* Rowley, 1798, 4 Ves. 216; Reed *v.* Devaynes, 1791, 2 Cox, Ch. 285; Dix *v.* Reed, 1823, 1 S. & S. 239; Piggott *v.* Green, 1833, 6 Sim. 72; Jewis *v.* Lawrence, 1869, L. R. 8 Eq. 45; In re Banbury's Trusts, 1876, Ir. R. 10 Eq. 408; In re Reeve's Trusts, 1877, 4 Ch. D. 841.

[1] White *v.* M'Dermott, 1872, Ir. R. 7 C. L. 1.

[2] Id.

[3] 11 G. 4 & 1 W. 4, c. 40.

[4] In re Knowles, 1880, 49 L. J. Ch. 625.

[5] The old technical te *vence de blet*," for the p growing crop.

[6] West *v.* Moore, 1807, 8

[7] Cooper *v.* Woolfitt, 18 Ex. 310.

[8] Evans *v.* Williamso Ch. D. 696 (C. A.).

[9] Cooper *v.* Woolfitt, 18 Ex. 310.

[10] 22 & 23 Car. 2, c. 10, by "Stat. Law Rev. Act, V. c. 3); In re Goodma 1880, 14 Ch. D. 619.

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§§ 168, 169.

usive, unless there be something in the will itself to show y an intention to provide for natural children.[1] In this vent, such a child, though en ventre sa mere at the date of ill, is included in the term.[2] The word "cousins," in a is interpreted to mean "first cousins" only;—first cousins persons who are cousins german, that is, persons having ame grandparents; while "second cousins" primâ facie s persons having the same great-grandparents.[3] Neither sins" nor "second cousins" will, in the absence of an nt intention,[4] include the children or grandchildren of first ns, who are commonly called first cousins once or twice ved.[5] Again: a testator who uses the word "family" will resumed, primâ facie, to mean the children, if any, of the n whose family is spoken of, and there must be a special xt to give the word a different meaning.[6] Further, the "moneys" in a testamentary instrument, will, in the ce of anything in the instrument indicating a different tion,[6] be confined to ready money actually in hand;[7] the "furniture"—unless under special circumstances[8]—will nclude tenant's fixtures,[9] the term "debentures" will not de "debenture stock,"[10] and the term "unmarried" will, s otherwise explained by the context, mean "without ever g been married."[11]

69. Another general primâ facie presumption of law is, that *cuments were made on the day they bear date.*[12] This pre- tion obtains, whether the document be a modern or ancient

orin *v.* Dorin, 1875, L. R. 7 568; Ellis *v.* Houstoun, 1878, . D. 236; Boyes *v.* Bedale, 23 L. J. Ch. 233; Megson *v.* e, 1880, 15 Ch. D. 198 (C. A.). ker *v.* Hordern, 1876, 1 Ch. D.

ook *v.* Hill, 1876, 3 Ch. D.

e Parker, Bentham *v.* Wilson, 15 Ch. D. 528; 17 Ch. D. 262).

e Bonner, Tucker *v.* Good, 19 Ch. D. 201.

gg *v.* Clarke, 1876, 3 Ch. D.

e Re Cadogan, Cadogan *v.* Palagi, 1883, 25 Ch. D. 154.

[7] Langdale *v.* Whitfield, 1858, 27 L. J. Ch. 795; Williams *v.* Williams, 1877, 8 Ch. D. 789, 793.

[8] Paton *v.* Sheppard, 1839, 10 Sim. 186.

[9] Finney *v.* Grice, 1878, 10 Ch. D. 13.

[10] In re Lane, 1880, 14 Ch. D. 856.

[11] Dalrymple *v.* Hall, 1881, 16 Ch. D. 715.

[12] Malpas *v.* Clements, 1850, 19 L. J. Q. B. 435; Potez *v.* Glossop, 1848, 2 Ex. 191; Morgan *v.* Whitmore, 1852, 20 L. J. Ex. 289.

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§ 169. deed,[1] a bill of exchange or promissory note,[2] an acco even a letter,[4] and whether it be written by a party to or not.[5] The rule, however, has been only recognis reluctance by at least some distinguished judges,[6] an moreover, certainly subject to two *exceptions*.[7] The where, in order to prove a petitioning creditor's debt, an ment is put in signed by the bankrupt, which purports date before the act of bankruptcy. The effect of a proce bankruptcy being retrospective,[8] and to invalidate all tran which have taken place between the act of bankruptcy time when the adjudication takes effect, the court feels a able jealousy of a collusion between the petitioning cred the bankrupt, and, accordingly, requires that independe of the existence of the instrument, previous to the act o ruptcy, should be given in evidence.[9] The *second exc* where, in petitions for damages for adultery,[10] letters ar evidence to show the terms on which the husband and w living before the adultery. Here again, to avoid the danger of collusion, some independent proof must be gi the letters were written at the time they bear date.[11] *exception* to the rule in those cases perhaps now exist evidence of indorsements made by a deceased oblig bond, acknowledging the receipt of interest, is tendere

[1] Anderson *v.* Weston, 1840, 6 Bing. N. C. 296; Davies *v.* Lowndes, 1843, 12 L. J. C. P. 506; Doe *v.* Stillwell, 1838, 8 A. & E. 645; Smith *v.* Battens, 1834, 1 M. & Rob. 341.

[2] 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 13; Anderson *v.* Weston, 1840, 6 Bing. N. C. 296; Smith *v.* Battens, 1834, 1 M. & Rob. 341.

[3] Sinclair *v.* Baggaley, 1838, 7 L. J. Ex. 305.

[4] Potez *v.* Glossop, 1848, 2 Ex. 191; Lewis *v.* Simpson, 1848, 2 Ex. 196, n.; and Angell *v.* Worsley, 1849, 2 Ex. 196, n.; Hunt *v.* Massey, 1834, 5 B. & Ad. 902; Goodtitle *v.* Millburn, 1837, 6 L. J. Ex. 209.

[5] Potez *v.* Glossop, 1848, 2 Ex. 191; Anderson *v.* Weston, 1840, 6 Bing. N. C. 296.

[6] Potez *v.* Glossop, 184 191. See also Butler *v.* Mo 1859, 7 H. L. C. 646.

[7] See also Re Adams L. R. 3 P. & D. 253.

[8] 46 & 47 V. c. 52 ("T ruptcy Act, 1883"), § 43.

[9] Anderson *v.* Weston, 18 N. C. 296; Sinclair *v.* 1838, 7 L. J. Ex. 305; Coryton, 1812, 4 Taunt. 560 *v.* Lainson, 1837, 6 L. J. These cases overrule Tayl lock, 1816, 1 Stark. R. 175.

[10] See 20 & 21 V. c. Matrimonial Causes Act § 33.

[11] Trelawney *v.* Colema Stark. R. 193 (Holroyd, J. ston *v.* Smyth, 1825, 2 C (Best, C.J.).

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ee, to defeat a plea of the Statute of Limitations, by the r.[1]

70. In applying the presumption that a document was n on the day on which it is dated to bills of exchange, the of a bill, though primâ facie evidence of the day when it drawn, is no proof that it was *accepted* at the same time. nost that the law will presume is that a bill was accepted a reasonable time after it was drawn, and before its rity; and it makes that presumption, because in all ordinary actions such a course of business would be pursued.[2]

71. It is another primâ facie presumption of law that a n has been duly appointed to it if he has in fact *acted in ficial capacity*. For it cannot be supposed that any man l venture to intrude himself into a public situation which s not authorised to fill. The legislature itself has expressly ed this presumption in the statutes relating to the excise[3] customs.[4] At common law it applies to lords of the ury,[5] masters in chancery, though exercising special powers,[6] y county court judges,[7] commissioners for taking affidavits,[8] gates,[9], sheriffs,[10] under-sheriffs,[11] justices of the peace,[12] ables,[13] though appointed by commissioners under a local e Act,[14] trustees under a turnpike Act,[15] churchwardens,[16] eers,[17] vestry-clerks,[18] trustees empowered to raise church- under a local Act,[19] weigh-masters of market towns,[20]

e this question discussed, post, —696.

berts *v.* Bethell, 1852, 22 L. J. 9, questioning Israel *v.* Argent, nd Blyth *v.* Archbold, 1835, ited in Pears. Chit. Pl. 330, See 45 & 46 V. c. 61 ("The f Exchange Act, 1882") § 13. & 54 V. c. 21 ("The Inland ue Regulation Act, 1890"),

& 40 V. c. 36 ("The Customs idation Act, 1876"), s. 261.

v. Jones, 1809, 2 Camp. 131.

arshall *v.* Lamb, 1843, 13 Q. B. 75.

v. Roberts, 1878, by Ct. of App.

v. Howard, 1832, 1 M. & 87; R. *v.* Newton, 1844, 1 C. 480.

[9] R. *v.* Verelst, 1813, 3 Camp. 432.

[10] Bunbury *v.* Matthews, 1844, 1 C. & Kir. 382.

[11] Doe *v.* Brawn, 1821, 5 B. & Ald. 243. See Plumer *v.* Brisco, 1847, 17 L. J. Q. B. 158; Robinson *v.* Collingwood, 1865, 34 L. J. C. P. 18.

[12] Berryman *v.* Wise, 1792, 4 T. R. 366.

[13] Id.

[14] Butler *v.* Ford, 1833, 1 C. & M. 662.

[15] Pritchard *v.* Walker, 1827, 3 C. & P. 212.

[16] R. *v.* Mitchell, 1818, cited 2 St. Ev. 307, n. (*r*).

[17] Doe *v.* Barnes, 1846, 8 Q. B. 1037.

[18] M'Gahey *v.* Alston, 1836, 6 L. J. Ex. 29.

[19] R. *v.* Murphy, 1837, 8 C. & P. 310.

[20] M'Mahon *v.* Lennard, 1858, 6 H. L. C. 970; Hayes *v.* Dexter, 1861,

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§§ 171, 172.

attested soldiers engaged in the recruiting service,[1] and, to all public officers.[2] Moreover, no distinction is rec though the appointment is one required to be either in or under seal,[4] or though an action be brought in the the officer,[5] or though the title be directly put in issu pleading,[6] or though the proceedings be criminal, instance, a trial for the murder of a constable in the e of his duty), and in the highest degree penal.[7] Nor exception to the rule be allowed, even where parties are for offences committed by them in their character o officers. For example, if a person employed by the P be indicted for stealing or embezzling a letter,[8] his appointment need not be proved, but it will suffice to sh he has acted in the capacity charged.[9]

§ 172. On similar principles the law primâ facie presu existence of certain relations in life from the fact that are proved to have acted towards each other as occupyi relationships. From such conduct there may be infe relations of landlord and tenant, of partnership, and o and servant,[10] or of master and apprentice, even where proof of the existence of any indenture has been giv

11 Ir. C. L. R. 106; 13 Ir. C. L. R. 22 (Ir.); M'Mahon *v.* Ellis, 1863, 10 Ir. C. L. R. 499, 509 (Ir.).

[1] Walton *v.* Gavin, 1850, 16 Q. B. 48.

[2] M'Gahey *v.* Alston, 1836, 6 L. J. Ex. 29; Marshall *v.* Lamb, 1843, 13 L. J. Q. B. 75; Doe *v.* Young, 1845, 15 L. J. Q. B. 9.

[3] See cases cited in preceding notes to this section.

[4] Dexter *v.* Hayes, 1860, 11 Ir. C. L. R. 106. (Fitzgerald, B., explaining Smith *v.* Cartwright, 1851, 20 L. J. Ex. 401.)

[5] M'Gahey *v.* Alston, 1836, 6 L. J. Ex. 29; M'Mahon *v.* Lennard, 1858, 6 H. L. C. 970; Doe *v.* Barnes, 1846, 8 Q. B. 1037, which was an action of ejectment brought by parish officers. Cannell *v.* Curtis, 1835, 2 Bing. N. C. 228, where an averment in a declaration that the plaintiff *had been appointed* and was assistant overseer was traversed by the plea. But Tindal, C.J., intimated a strong opinion that it was only for the plaintiff to prove *acted* as assistant overse ruling was cited by Parke M. & W. 209, 1836.

[6] Hayes *v.* Dexter, 18 C. L. R. 22; M'Mahon *v.* 1858, 6 H. L. C. 970.

[7] R. *v.* Gordon, 1789, 1

[8] See 7 W. 4 & 1 V. c. Post Office (Offences) Ac §§ 25, 26.

[9] Clay's case, 1784, 2 E 580; R. *v.* Rees, 1834, 6 C. R. *v.* Barrett, 1833, 6 C. R. *v.* Townsend, 1841, C. 178; R. *v.* Goodwin, 182 C. C. 100. In an Irish c proof of acting with the the Post-office authorities rently held necessary. R. *v.* 1841, Ir. Cir. R. 172. Sed

[10] R. *v.* Fordingbridge, L. J. M. C. 290.

[11] Id.; R. *v.* St. Marylel 4 Dowl. & Ry. 475.

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§ 172.

legal presumption is also raised in favour of the validity marriage which is shown to have been celebrated de and will not be rebutted where a minor is married by in her father's lifetime by the mere fact that the 's name appears in the register as the consenting party, evidence is adduced as to the consent of the father;[2] if s live together as man and wife, it will, in favour of ty and decency, be presumed that they are legally d,[3] while this presumption has been carried in Scotland that even where the connexion was shown to have nced in adultery, a subsequent valid marriage has been d from strong evidence of habit and repute.[4] Two ons to this last example are, however, recognised in nd. Both on an indictment for bigamy,[5] and on a petition ng damages against an alleged adulterer,[6] a valid first ge[7] must be proved; and even the proof of a ceremony, the parties supposed to be sufficient to constitute the n of husband and wife, is not enough, unless it be shown egally valid.[8] Moreover, the fact of the marriage must

s *v.* Piers, 1849, 2 H. L. C. chel *v.* Lambert, 1864, 33 P. 137; Sastry Velaider *v.* utty, 1881, 6 App. Cas. 364 In re Shephard, 1904, 1 Ch. kewich, J.). See Harrod *v.* 1854, 1 K. & J. 4, also ante,

rison *v.* Corp. of Southampton, L. J. Ch. 722.
v. Fleming, 1827, 4 Bing. oodman *v.* Goodman, 1859, Ch. 745; Collins *v.* Bishop, L. J. Ch. 31; Sastry Velaider ecutty, 1881, supra; In re d, supra. The same presump- cognised by the Mahommedan nee Khujooroonisa *v.* Mus- Coushun Jehan, 1876, L. R. 3 p. 291 (P. C.)); and by the Dutch Law as prevailing in Aronegary *v.* Sambonade, App. Cas. 364 (P. C.); In re on, 1905, 91 L. T. 680. Breadalbane case, 1867, L. R. Sc.) 182; explaining, or, per- some may think, *explaining* unningham *v.* Cunningham, Dow, 483; and Lapsley *v.* Grierson, 1848, 1 H. L. C. 498. See also Lyle *v.* Ellwood, 1874, L. R. 19 Eq. 98; De Thoren *v.* Att.-Gen., 1875, 1 App. Cas. 686 (H. L.); and Dysart Peer., 1881, 6 App. Cas. 489.

[5] 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 57. See R. *v.* Griffin, 1879, 14 Cox, C. C. 308.

[6] 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

[7] The *second* marriage need not be such as would be binding in law, if it were not bigamous; *e.g.*, a widower may be convicted of bigamy, if, having a second wife living, he has gone through the ceremony of marriage with a niece of his first wife. R. *v.* Allen, 1872, L. R. 1 C. C. R. 367; overruling R. *v.* Fanning, 1865, 17 Ir. C. L. R. 289.

[8] Catherwood *v.* Caslon, 1844, 13 L. J. Ex. 433; Burt *v.* Burt, 1860, 29 L. J. P. & M. 133. But see Rooker *v.* Rooker and Newton, 1864, 33 L. J. P. & M. 42. See, also, Patrickson *v.* Patrickson, 1865, L. R. 1 P. & D. 86; and cases cited ante in two last notes save one to § 143-4.

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§§ 172, 173.

be proved with strictness; thus the certificate of a charge of a Roman Catholic church by whom it was a parties were married was held inadmissible to prove t the marriage, the proper evidence being the certifica registrar of marriages for the district.[1] These two rest on the ground, that such proceedings, being o nature, require the strictest proof; and for the exceptio of adultery, a further reason is, to prevent parties fr up pretended marriages for evil purposes.[2]

§ 173. It is not altogether clear, however, ho presumption, derivable from *acting* in a particular raises a primâ facie presumption that those who ha filled the character, which they have assumed, of *bodies*, or of persons suing or being sued as *profession* as filling particular situations. On an indictment, whi the accused with obtaining the goods of the compan pretences,[3] parol evidence that a limited company ha such was held sufficient, without strict proof of inco but in this case no allegation of ownership was neces an action against a clergyman for non-residence, t was held not to be bound to prove the admission, i and induction of the defendant, but to have given primâ facie evidence by showing that he had received acted as incumbent.[5] Plaintiff's appointment as Farri under the Post-horse Act, was, too, presumed from having accounted to him as such;[6] and a solicitor, party for slandering him in his profession, by thre strike him off the rolls for misconduct, recovered d proof that he had acted as a solicitor, without showi admission and enrolment.[7] The same lax evidence times been allowed in actions by surgeons[8] and so

[1] R. *v.* Lindsay, 1902, 66 J. P. 505 (Walton, J.).

[2] Morris *v.* Miller, 1767, 4 Burr. 2057; Birt *v.* Barlow, 1779, 1 Doug. 171, 174.

[3] R. *v.* Langton, 1877, 2 Q. B. D. 296 (C. A.).

[4] By 24 & 25 V. c. 96 ("The Larceny Act, 1861").

[5] Bevan *v.* Williams, 1775, 1776, 3 T. R. 635, *n.*

[6] Radford *v.* M'Into T. R. 632.

[7] Berryman *v.* Wise, 366.

[8] Gremaire *v.* Le Clerk 1809, 2 Camp. 144. S *v.* Rowlands, 1836, 6 I But 21 & 22 V. c. 9 rendered it necessary f

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§§ 173—175.

ees, and by parsons for their tithes.[1] But all these cases, os, rest not so much upon the presumption now under sion, as on the ground that the opposite party had, by his sions, either by word or deed, rendered it unnecessary to the actual appointment.[2] Where no such admission has made, the safer, if not, the necessary, course will be to the appointment in the ordinary manner; and to do so most consistent with modern practice and the latest ons.

74. As a rule, indeed, it is clear in an action for slander n in any particular character, the plaintiff must show that sesses that character.[3] At all events, where in an action faming him as a physician by using words denying that he n M.D. degree, the plaintiff, not content with resting his n evidence of having practised, proceeded to prove that he eceived the degree of M.D. from a Scotch University ndrews), the court having held that this did not entitle practise in England, he was not allowed to fall back upon of practice, on the legality of which he had himself thrown

75. There are, moreover, three actions, brought by persons lleged that they held particular offices, where the plaintiffs espectively nonsuited on failing to prove appointment to ice claimed, although it does not appear that any evidence fered that they had ever acted in the respective capacities d.[4] These cases, though for this reason, perhaps, not authorities, tend to show what the practice has been, and

nd 41 & 42 V. c. 33, § 5 ed by 49 & 50 V. c. 48, § 26) *dentist*), when suing for his , to prove his due registra-

lford *v.* M'Intosh, 1790, 3 32; Berryman *v.* Wise, 1791, 366. See Green *v.* Jackson, ea. R. 236.

Smith *v.* Taylor, 1805, 1 Bos. N. R. 210; also judgment of J.

lins *v.* Carnegie, 1834, 1 A. & , 703; Pickford *v.* Gutch, T. R. 305, n.; and Smith *v.* 1805, 1 Bos. & P. N. R. 196, where possibly the words implied an admission of the character in which the plaintiff sued. In actions of this kind, if the statement of claim alleged that the plaintiff holds a certain office, or belongs to a particular profession or trade, no evidence is now required to support this statement, unless it be distinctly denied in the statement of defence. R. S. C., 1883, Ord. xix. r. 13.

[4] Sellers *v.* Till, 1825, 4 B. & C. 655; Savage *v.* ——, 1780, 1 Doug. 356, n. 4; Cortis *v.* Kent Waterworks Co., 1827, 7 B. & C. 314.

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§§ 175, 176.

so far support the view that the rule which renders evi acting primâ facie proof of due appointment, is confined where the parties occupy a *public* situation, or, perhaps, w question of appointment is *not directly* in issue.[1]

§ 176. There are also various primâ facie presumptior are founded upon the experience of human conduct *ordinary course of business*. For instance, a mere holding o the expiration of an old lease, even for a long period (suc years), raises no presumption of a new tenancy from year;[2] but the receipt of rent raises a legal presump new tenancy from year to year;[3] though either the paye receiver of such rent may repel the presumption, by prov the payment was made under circumstances inconsisten as, for example, under the impression that the old lease subsisting.[4] Again, if a tenancy from year to year be the law presumes that it was intended to be determi either party at the end of the first, as well as of any sub year, unless the parties, when arranging the term contract, have used expressions showing that they cont a tenancy for two years at least.[5] Further, if a lesso mortgaged his reversion, is permitted by the mort continue in the receipt of the rent incident to that reve is during such permission presumptione juris authori should become necessary, to sue for such rent, or to p recover damages in respect of any trespass or wrong r the property, in his own name only.[6] Whether, und circumstances, the mortgagor could realise the rent by in his own name, is not so clear, but under the old law,

[1] R. *v.* Jones, 1774, 1 Lea. 174, where, on an indictment against an apprentice for fraudulent enlistment, it was held that the indenture must be proved, is an authority on neither side of this question, for that decision rested on the ground, that as the *actual and legal* binding was the fact which constituted the gist of the offence, this could only be proved by the best evidence.

[2] Cusack *v.* Farrell, 1827, 18 L. R. Ir. 494; 20 L. R. Ir. 56.

[3] Bishop *v.* Howard, 1823, 2 B. & C. 100; Doe *v.* Taniere, 1848, 18 L. J. Q. B. 49; Eccles. C Merral, 1869, L. R. 4 Ex these last two cases the le a corporation.

[4] Doe *v.* Crago, 1848, 17 263.

[5] Doe *v.* Smaridge, 184 Q. B. 327. See Brown 1860, 29 L. J. C. P. 251; Carleton, 1873, L. R. 9 Ex

[6] 36 & 37 V. c. 66 ("Th Court of Judicature Act § 25, sub-s. 5; 40 & 41 V. sub-s. 5 (Ir.).

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for it in the mortgagee's name, and as his bailiff.[1] e implied authority is also recognised in favour of a party, the mortgagor has assigned his equity of redemption.[2] n actions of trover, the jury will be advised, if not to presume, a conversion from unexplained evidence of d and refusal.[3]

. Whether paying off a mortgage will keep it alive or h it, depends upon the intention of the parties; but, in nce of any *express* evidence, equity will raise a presump- avour of that intention, which, under the circumstances, e most advantageous to the party paying. Thus, a e paid off by a tenant for life will, as stated in another e presumed to have been intended to be retained for his efit against the inheritance; but if the owner of an fee or in tail pays off a charge, a contrary presumption recognised, and the mortgage will primâ facie be shed.[5]

It is also primâ facie presumed upon a general hiring ant, without any stipulation as to time, that such hiring year, unless, indeed, there are circumstances tending to is presumption,[6] as, for instance, an agreement to pay or monthly wages, with no stipulation showing an that the service should continue for a longer period eek or a month.[7] This rule applies to domestic as well m servants. There is, however, this difference between classes, that the service of domestic servants, unlike arm servants,[8] may be determined by a month's warning ayment of a month's wages.[9] In the case of clerks,

v. Hunt, 1853, 22 L. J. Ex.
v. Finch, 1863, 32 L. J.
e *v.* Spanton, 1844, 7 M. & Stancliffe *v.* Hardwick, M. & R. 1, 12; Thompson 1826, 2 C. & P. 334; *v.* Small, 1845, 14 L. J. ; Davies *v.* Nicholas, 1836, . 339; Clendon *v.* Dinne- l, 5 C. & P. 13. See Lewis, 1849, 7 C. B. 608. § 154.

[5] Adams *v.* Angell, 1876, 5 Ch. D. 634; Mohesh Lal *v.* Mohunt Bawan Das, 1883, L. R. 10 Jud. App. 62, 70, 71.

[6] Lilley *v.* Elwin, 1843.

[7] R. *v.* Worfield, 1794, 5 T. R. 508; R. *v.* St. Andrew, Pershore, 1828, 8 B. & C. 679; R. *v.* Pilkington, 1844, 13 L. J. M. C. 61; Baxter *v.* Nurse, 1844, 13 L. J. C. P. 82.

[8] Beeston *v.* Collyer, 1827, 4 Bing. 313.

[9] Turner *v.* Mason, 1845, 14 L. J. Ex. 311 (Parke); Beeston *v.* Collyer,

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§§ 177—178. warehousemen, travellers, editors, reporters, actors, ushers, governesses, and the like, the law raises no inflexible presumption of an indefeasible yearly hiring from the mere fact of a hiring for an indefinite period. In all such cases, the jury must determine the question for themselves, after weighing all the circumstances proved, and ascertaining, if possible, what usage prevails in the particular business or employment to which the hiring relates.[1]

§ 177A. There is a presumption that there was a promise that the act should be done within a reasonable time on proof of a promise to marry,[2] to discharge a cargo,[3] and in all cases (*e.g.*, a contract to deliver goods) in which the time of completion has been left undefined.[4]

§ 178.[5] Moreover, as men are usually vigilant in guarding their property, prompt in asserting their rights, and diligent in claiming and collecting their dues, the law primâ facie presumes, when a bill of exchange or an order for the payment of money or the delivery of goods is found in the hands of the drawer, or a promissory note is found in the possession of the maker, that such note has been duly paid,[6] or that the goods ordered have been delivered;[7] a receipt for the last year's or quarter's rent is evidence of all the rent previously accrued having been paid.[8] Further, the mere delivery of money, or of a bank cheque, by one person to another, or the transfer of stock, is, if unexplained, presumptive evidence of the payment of an antecedent debt, and not of a loan;[9] while payment of money

1827, 4 Bing. 313; Fawcett *v.* Cash, 1834, 5 B. & Ad. 904. Ante, § 34.

[1] Baxter *v.* Nurse, 1844, 13 L. J. C. P. 82. See Holcroft *v.* Barber, 1843, 1 C. & K. 4; Todd *v.* Kerrick, 1852, 22 L. J. Ex. 1; Parker *v.* Ibbetson, 1858, 27 L. J. C. P. 236; Fairman *v.* Oakford, 1860, 29 L. J. Ex. 459.

[2] Potter *v.* Deboos, 1815, 1 Stark. R. 82; Atchinson *v.* Baker, 1797, Peake, Add. Cas. 103.

[3] Postlethwaite *v.* Freeland, 1880, 5 App. Cas. 599 (H. L.).

[4] Ellis *v.* Thompson, 1838, 3 M. & W. 456. See Ford *v.* Cotesworth, 1870, L. R. 5 Q. B. 544.

[5] Gr. Ev. § 38, in part.

[6] Brembridge *v.* Osborne, 1816, 1 Stark. R. 374.

[7] Gibbon *v.* Featherstonhaugh, 1816, 1 Stark. R. 225; Egg *v.* Barnett, 1800, 3 Esp. 196; Garlock *v.* Geortner, 1831, 7 Wend. 198 (Am.); Alvord *v.* Baker, 1832, 9 Wend. 323 (Am.); Weidner *v.* Schweigart, 1823, 9 Serg. & R. 385 (Am.); Shepherd *v.* Currie, 1816, 1 Stark. R. 454.

[8] 1 Gilb. Ev. 309; Brewer *v.* Knapp, 1823, 1 Pick. 337 (Am.); 23 & 24 V. c. 154, § 47.

[9] Welch *v.* Seaborn, 1816, 1 Stark. R. 474; Breton *v.* Cope, 1791, Peake, 31; Lloyd *v.* Sandiland, 1818, Gow, 13, 16; Cary *v.* Gerrish, 1801, 4

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her, which the drawer admittedly had in his hands, must umed on its being shown that a cheque in favour of the f, who has had it duly cashed, has been drawn on the t of the person who held the money, though it be not that the cheque was directly received by the plaintiff he defendant, and it be urged that it might have passed h many other hands.[1]

9.[2] Several primâ facie presumptions, moreover, are made he regular course of business in a *public office*. Thus, rks on letters (*when* capable of being deciphered) are facie evidence that the letters were in the post at the time ace therein specified;[3] "the official mark of any sum on stal packet as due to the Post-office, British, colonial, or , in respect of that packet, shall in every part of Her y's dominions be received as evidence of the liability of acket to the sum so marked;"[4] and if a letter properly d[5] is proved to have been either put into the post-office, vered to the postman,[6] it is presumed to have reached its tion at the regular time, and to have been received by the to whom it was addressed.[7]

30. This last presumption, indeed, though generally only facie,[8] is in certain cases rendered conclusive, either by of court, or by Act of Parliament. Thus, Order LXVII. the R. S. C. of 1883 provides, that "notices sent from

Aubert *v.* Walsh, 1812, 4 293; Boswell *v.* Smith, C. & P. 60; Graham *v.* Cox, C. & K. 702; Patton *v.* Ash, Serg. & R. 116, 125.

untford *v.* Harper, 1847, 16 . 182.

Ev. § 40, in part.

tcher *v.* Braddyll, 1821, 3 . 64; R. *v.* Johnson, 1805, 7 5; R. *v.* Watson, 1808, 1 215; Archangelo *v.* Thomp- 311, 2 Camp. 623; R. *v.* , 1814, R. & R. 264; Stocken n, 1841, 10 L. J. Ex. 227; *v.* Mountgarret, 1859, 7 H. L.

& 39 V. c. 22, § 8.

ere the address was "Mr. , Bristol," it was held in- t to raise this presumption: Walter *v.* Haynes, 1824, Ry. & M. 149.

[6] Skilbeck *v.* Garbett, 1845, 14 L. J. Q. B. 338.

[7] Saunderson *v.* Judge, 1795, 2 H. Bl. 509; Woodcock *v.* Houldsworth, 1846, 16 L. J. Ex. 49; Dunlop *v.* Higgins, 1848, 1 H. L. C. 381; Household Fire, &c. Ins. Co. *v.* Grant, 1879, 48 L. J. Ex. 577 (C. A.); Bussard *v.* Levering, 1821, 6 Wheat. 102 (Am.); Lindenberger *v.* Beal, 1821, 6 Wheat. 104 (Am.); Warren *v.* Warren, 1834, 1 C. M. & R. 250; Kufh *v.* Weston, 1799, 3 Esp. 54; Dobree *v.* Eastwood, 1827, 3 C. & P. 250; Wall's case, 1872, L. R. 15 Eq. 18; In re Hickey, 1875, Ir. R. 10 Eq. 117; Story, Bills, § 300.

[8] Reidpath's case, 1870, L. R. 11 Eq. 86.

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§ 180. any office of the Supreme Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service." So, too, by Order LIV. r. 2 of the C. C. R. of 1903 "any notice, proceeding, or document required by these rules to be served on any party, and as to which no mode of service is prescribed by these rules, may be so served . . . . by sending the same by post, addressed to such person at his last-known residence or place of business; and any such notice, proceeding, or document, if served by post, shall, unless the contrary be proved, be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice, proceeding, or document, it shall be sufficient to prove that the same was properly addressed and posted." Under sec. 142 of the Bankruptcy Act, 1883, "all notices and other documents, for the service of which no special mode is directed, may be sent by prepaid post letter to the last known address of the person to be served therewith,"[1] and by the Bankruptcy Rules, as to notices of meetings of creditors,[2]— "an affidavit by the trustee, official receiver, or other officer of the court, or the solicitor in the matter, or by the clerk of any such person that the notice has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed." There are also contained in such rules special provisions,[3] as to the service of creditors' petitions, and the proof of such service with respect to bankruptcy notices,[4] and as to serving and proving service of petitions for administering insolvent estates,[5] while the rules further provide[6] that, "where notice of an order or other proceeding in court may be served by post, it shall be sent by *registered* letter."[7] Again, in Scotland, any summons or warrant of citation, whether of a party or a witness, or warrant of service or judicial intimation, may, in any civil action or proceeding in any court, be executed

[1] 46 & 47 V. c. 52, § 142.
[2] See rr. 184 and 188.
[3] See Bankruptcy Rules, 144—8.
[4] Id. r. 123.
[5] Id. r. 201.
[6] Id. r. 82.
[7] See, however, 46 & 47 V. c. 52, § 11, which relates to the service of orders staying proceedings, and is inconsistent with the above rule.

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§ 180.

by posting a *registered* letter duly addressed.[1] And, under various Acts of Parliament, the service of notices and other documents by post (which is indeed sometimes required to be *registered* post) is permitted. Some of the principal of these Acts are enumerated in the foot-note, but reference must be made to the provisions of the particular statute to see if any given notice or document has been served in the manner required by its provisions.[2]

[1] 45 & 46 V. c. 77, §§ 3 and 4.

[2] Some of the principal of the statutes here referred to, arranged alphabetically (no better arrangement suggesting itself), under which notices, &c., may be served by post, are as follow:—"The Agricultural Holdings (England) Act, 1833" (46 & 47 V. c. 61, § 28); "The Alkali, &c. Works Regulation Act, 1881" (44 & 45 V. c. 37, amended 55 & 56 V. c. 30, § 26); "The Army Act, 1881" (44 & 45 V. c. 58, § 163, sub-sect. F.); The Act of 1851 as to Charitable Institutions (14 & 15 V. c. 56, § 2); "The Companies Act, 1862" (25 & 26 V. c. 89, §§ 62, 63); "The Companies Clauses Act, 1845" (8 & 9 V. c. 16, § 136); "The Conveyancing and Law of Property Act, 1881" (44 & 45 V. c. 41, § 67, sub-sect. 4); "The Copyhold Act, 1894" (57 & 58 V. c. 46, § 57, sub-sect. 1 *b*); "The Corrupt and Illegal Practices Prevention Act, 1883" (46 & 47 V. c. 51, § 62); The Act of 1844 as to County Rates (7 & 8 V. c. 33, § 6); "The Dentists Act, 1878" (41 & 42 V. c. 33, § 39); "The Diseases of Animals Act, 1894" (57 & 58 V. c. 57, § 48, sub-sect. 3); "The Ecclesiastical Dilapidations Act, 1871" (34 & 35 V. c. 43, § 69); "The Electric Lighting (Clauses) Act, 1899" (62 & 63 V. c. 19, § 62); "The Elementary Education Act, 1870" (33 & 34 V. c. 75, § 81); "The Endowed Schools Act, 1869" (32 & 33 V. c. 56, § 57); "The Employers' Liability Act" (43 & 44 V. c. 42, § 7), on the construction of which see Moyle *v.* Jenkins, 1881, 8 Q. B. D. 116; "The Explosives Act, 1875" (38 & 39 V. c. 17, § 85); "The Factories and Workshops Act, 1901" (1 Edw. 7, c. 22, § 148); "The Friendly Societies Act, 1896" (59 & 60 V. c. 25, § 94, sub-sect. 5); "The Infant Life Protection Act, 1897" (60 & 61 V. c. 57, § 13); "The Landed Property Improvement (Ireland) Act, 1847" (10 & 11 V. c. 32, § 60); "The Land Transfer Act, 1875" (38 & 39 V. c. 87, § 90); "The Licensing Acts, 1872" (35 & 36 V. c. 94, § 70); "The London County Council Act" (see 18 & 19 V. c. 120, § 22, and 51 & 52 V. c. 41, § 40, sub-sect. 8); "The Lunacy Act, 1890" (53 V. c. 5, § 327); "The Mines Regulation Acts, 1872" (35 & 36 V. c. 76. § 71, and c. 77, § 40); "The Parliamentary Voters' Registration Act, 1843" (6 & 7 V. c. 18); "The Patents Designs and Trademarks Act, 1883" (46 & 47 V. c. 57, § 97); "The Poor Law Amendment Act, 1844" (7 & 8 V. c. 101); "The Public Health Acts, 1875," for England (38 & 39 V. c. 55, § 267. When service of a notice under § 267 of The Public Health Act, 1875 is made by letter through the post, the letter must be prepaid in order to make the service good: Walthamstow Urban District Council *v.* Henwood, 1897, 1 Ch. 41; and for Ireland (41 & 42 V. c. 52, § 267); "The Public Works Loans Act, 1875" (38 & 39 V. c. 89, § 47); "The Regulation of Railways Act, 1873" (36 & 37 V. c. 48, § 35); "The Telegraphs Act, 1878" (41 & 42 V. c. 76, § 12); "The Valuation (Metropolis) Act, 1869" (32 & 33 V. c. 67, § 65); "The Parliamentary Voters' Registration Act, 1843," for England (6 & 7 V. c. 18), on construction of which, see Bishop *v.* Helps, 1845, 15 L. J. C. P. 43; Hickton *v.* Antrobus, 1846, 2 C. B. 82; Bayley *v.* Overseers of Nantwich, 1846, 2 C. B. 118; Lewis *v.* Evans, 1874, L. R. 10 C. P. 297; Hornsby *v.* Bolton, 1856, 26 L. J. C. P.

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§§ 180a, 181.

§ 180A. Where by the course of business in a public department a thing has taken place which would not have been allowed to occur without the previous performance of certain formalities, it will be presumed that those formalities have taken place. Thus, on its being shown that the Custom-house would not have allowed goods to be entered without an indorsement on the licence, under which the vessel in which they came was sailing, of the time of her clearance, such an indorsement will be presumed to have been made;[1] and on proof that goods, which cannot be exported without licence, were entered at the Custom-house for exportation, a licence to export them will be presumed.[2]

§ 181. A similar presumption to that just mentioned is sometimes drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting.[3] For example, underwriters upon a foreign ship or a foreign voyage are presumed to know the usages and laws of foreign states which affect that ship or that voyage, because such knowledge is necessary for the due conduct of the business;[4] an underwriter is often presumed, as a matter of fact, though not as one of law,[5] to know the contents of Lloyd's Shipping List, to which, in the ordinary course of business, he has access;[6] a man who deals in a particular market will be taken to act according to the custom of that market; a man who, if he directs another to make a contract at a particular place, will be presumed to intend that the contract should be made according to the usage of that place;[7] so that a person employing a broker on the Stock Exchange impliedly authorises him to act in accordance with the rules there established, provided only that they be reasonable,

55; Hannaford *v.* Whiteway, 1856, 26 L. J. C. P. 75; and for Ireland, 13 & 14 V. c. 69, §§ 113, 114.

[1] Butler *v.* Allnutt, 1816, 1 Stark. R. 222.

[2] Van Omeron *v.* Dowick, 1809, 2 Camp. 44.

[3] Doe *v.* Turford, 1832, 1 L. J. K. B. 262; Champneys *v.* Peek, 1816, 1 Stark. R. 404; Pritt *v.* Fairclough, 1812, 3 Camp. 305.

[4] Young *v* Turing, 1841, 2 M. & Gr. 603; Noble *v.* Kennoway, 1780, 2 Doug. 513.

[5] Morrison *v.* The Universal Mar. Ins. Co., 1872, L. R. 8 Ex. 40, 197.

[6] Mackintosh *v.* Marshall, 1843, 12 L. J. Ex. 337. This presumption is strictly confined to cases where the assured has made no representation inconsistent with the list, which is calculated to mislead the underwriter. Id.

[7] Bayliffe *v.* Butterworth, 1847, 17 L. J. Ex. 18; Pollock *v.* Stables, 1848, 17 L. J. Q. B. 352; Graves *v.* Legg, 1857, 26 L. J. Ex. 316; Buckle *v.* Knoop, 1867, L. R. 2 Ex. 333. See post, §§ 1160 et seq.

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or, in other words, legal;[1] and this whether the principal himself be or be not acquainted with the rules by which such brokers are governed.[2] This latter doctrine, however, will not be carried too far;[3] and therefore where goods were shipped at Liverpool, and the bill of lading was indorsed to parties residing in New South Wales, evidence of a local usage in Liverpool, affecting the construction of the written contract, was held inadmissible as against the indorsees, in the absence of proof that they were acquainted with the usage.[4] Moreover, "Lloyd's" at the Royal Exchange is not a market within the rule, and the usage there prevalent among insurance brokers is not such a general usage as to bind merchants and shipowners unacquainted with its existence.[5] Indeed, it is doubtful whether the doctrine applies in its full force to cases of maritime insurance, and authorities[6] are not wanting which "look the other way."[7]

§ 182. The presumption arising from the usual course of men's private offices and business, again, gives rise, where letters or notices properly directed to a gentleman are left with his servant, to a primâ facie presumption that they reached his hands;[8] while the fact of sending a letter to the post-office will in general be regarded by a jury as presumptively proved, if the letter be shown to have been handed to, or left with, the clerk, whose duty it was in the ordinary course of business to carry it to the post, and he declares that, although he has no recollection of the

[1] See Pearson *v.* Scott, 1878, 9 Ch. D. 198.

[2] Sutton *v.* Tatham, 1839, 8 L. J. Q. B. 210; recognised in Bayliffe *v.* Butterworth, 1847, 17 L. J. Ex. 18; Pollock *v.* Stables, 1848, 17 L. J. Q. B. 352; Bayley *v.* Wilkins, 1849, 18 L. J. C. P. 273; Taylor *v.* Stray, 1857, 26 L. J. C. P. 287; Hodgkinson *v.* Kelly, 1868, L. R. 6 Eq. 496; Coles *v.* Bristowe, 1868, L. R. 4 Ch. 3 (C. A.); Bowring *v.* Shepherd, 1870, L. R. 6 Q. B. 309; Grissell *v.* Bristowe, 1868, L. R. 4 C. P. 36; Duncan *v.* Hill, 1871, L. R. 6 Ex. 255. See Nickalls *v.* Merry, 1875, L. R. 7 H. L. 530.

[3] See Robinson *v.* Mollett, 1875, L. R. 7 H. L. 802.

[4] Kirchner *v.* Venus, 1859, 12 Moo. P. C. C. 361. But see The Steamship Co. Norden *v.* Dempsey, 1876, 1 C. P. D. 654.

[5] Sweeting *v.* Pearce, 1861, 30 L. J. C. P. 109 (Ex. Ch.); Scott *v.* Irving, 1830, 1 B. & Ad. 605; Todd *v.* Reid, 1821, 4 B. & Ald. 210; Gabay *v.* Lloyd, 1825, 3 B. & C. 793.

[6] Bartlett *v.* Pentland, 1830, 10 B. & C. 760; Gabay *v.* Lloyd, 1825, 3 B. & C. 793.

[7] Bayliffe *v.* Butterworth, 1847, 17 L. J. Ex. 18.

[8] Macgregor *v.* Keily, 1849, 18 L. J. Ex. 391. This presumption is sometimes conclusive, as, for instance, in the case of a notice to quit served at the tenant's house on one of his servants. Tanham *v.* Nicholson, 1872, L. R. 5 H. L. 561.

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§§ 182, 183.

particular letter, he invariably took to the post-office all letters that either were delivered to him, or were deposited in a certain place for that purpose.[1] But it has been held at Nisi Prius that neither proof of the possession of a letter by a *deceased* person for the purpose of posting, nor of an entry in a postage book made by him in the ordinary course of business, is sufficient legal proof of the postage of a letter.[2]

§ 183. The working accuracy of scientific instruments is also presumed. For example, in the absence of evidence to the contrary, a jury would be advised to rely on the correctness of a watch or clock, which had been consulted to fix the time when a certain event happened; a thermometer would be regarded as a sufficiently safe indication of the heat of any liquid in which it had been immersed; a pedometer would afford primâ facie evidence of the distance between two places which had been traversed by the wearer; and similar primâ facie credit would be given to aneroids, anemometers, and other scientific instruments; and blood stains are every day detected by means of known chemical tests. Indeed, in some instances this presumption has been recognised by the legislature.[3] By § 42 of the Electric Lighting (Clauses) Act, 1899,[4] the "undertakers" supplying electric energy are to keep on their premises instruments of a pattern and construction approved by the Board of Trade, and the observations of such instruments are to be receivable in evidence. By § 57 of the same Act, a consumer, being in doubt as to the accuracy of a meter on his own premises, may have the matter determined, in manner provided by the section, by an electric inspector. If he omits that precaution,

[1] Skilbeck *v.* Garbett, 1845, 14 L. J. Q. B. 338; Hetherington *v.* Kemp, 1815, 4 Camp. 193; Trotter *v.* Maclean, 1875, 13 Ch. D. 580; Ward *v.* Ld. Londesborough, 1852, 12 C. B. 252; Spencer *v.* Thompson, 1856, 6 Ir. C. L. R. 537, 565. So, in Scotland, "where there is proof of the regular practice of a house of business to despatch its letters in a particular manner to the post-office, it is not necessary to prove that the individual letter in question was so despatched." Dickson, Ev. § 6, and cases cited in n. *e*.

[2] Rowland *v.* De Vecchi, 1882, Cab. & E. 10.

[3] Thus, under "The Gas Works Clauses Act, 1871," and the Public Health Acts of 1875 for England, and 1878 for Ireland, the register of a gas or water meter "shall be primâ facie evidence of the quantity" of gas or water consumed. See 34 & 35 V. c. 41, § 20; 38 & 39 V. c. 55, § 59; 41 & 42 V. c. 52, § 69, Ir.

[4] 62 & 63 V. c. 19.

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the register of his meter is to be conclusive evidence, in the absence of fraud, of the value of the supply.

§ 184. Various presumptions are again recognised in the law of *partnership*. The mere fact of participation in the net profits of a business was, prior to 1860, supposed,[1] by an arbitrary and absolute presumption of law, to constitute a partnership. In that year the House of Lords, in the well-known case of Cox *v.* Hickman,[2] however, denied the existence of any legal presumption to this effect. The legislature has now, by the Partnership Act, 1890,[3] provided, that although the receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner, it does not of itself make him one, and has laid down various rules for determining in fact whether a partnership does or does not exist. Consequently, although a right to share in the profits of trade is a strong test of partnership, and, when standing alone, will justify a jury in presuming its existence, the question whether or not several persons are partners must, nevertheless, in each case depend on the real intention and contract of the parties.[4] And the Act above referred to,[5] enables interest to be paid on loans of money to partnerships, and payments to be made on contracts for remuneration and annuities by partnerships, varying with the profits of the business, without making the recipient a partner. The Act further[6] recognises the presumption that formerly existed, both in England[7] and in America,[8] following the civil law,[9] in the absence of any contract between the partners, or any dealing from which a contract may

[1] Waugh *v.* Carver, 1793, 2 H. Bl. 235; Pott *v.* Eyton, 1846, 15 L. J. C. P. 257.

[2] 1860, 8 H. L. C. 268.

[3] 53 & 54 V. c. 39, § 2.

[4] Mollwo, March & Co. *v.* The Ct. of Wards, 1872, L. R. 4 P. C. 419, 435; Ross *v.* Parkyns, 1875, L. R. 20 Eq. 331; Pooley *v.* Driver, 1876, 5 Ch. D. 458; Ex p. Tennant, Re Howard, 1877, 6 Ch. D. 303 (C. A.); Ex p. Delhasse, Re Megevand, 1867, 7 Ch. D. 511 (C. A.); Pawsey *v.* Armstrong, 1881, 18 Ch. D. 698.

[5] 53 & 54 V. c. 39, § 2.

[6] § 24, sub-sect. 1.

[7] Stewart *v.* Forbes, 1849, 19 L. J. Ch. 133 (Lord Cottenham, C., recognising ruling of Lord Eldon in Peacock *v.* Peacock, 1809, 16 Ves. 49, 56); Webster *v.* Bray, 1848, 7 Hare, 159; M'Gregor *v.* Bainbrigge, 1848, 7 Hare, 164, n.; Robinson *v.* Anderson, 1855, 20 Beav. 98; Collins *v.* Jackson, 1862, 31 Beav. 645; Story, Part. § 24. But see contrà, Peacock *v.* Peacock, 1809, 16 Ves. 49, 56; and Tompson *v.* Williamson, 1831, 7 Bligh, 342.

[8] Gould *v.* Gould, 1830, 6 Wend. 263 (Am.).

[9] Inst. lib. 3, tit. 26, § 1; Dig. lib. 17, tit. 2, § 29.

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§§ 184, 185. be implied, that the business has been conducted on terms of an equal partnership; and, consequently, that each partner has a right to insist on an equal participation in profit and loss, and that, in the absence of evidence to the contrary, partners must be presumed to be interested in equal proportions in the partnership *stock*.[1]

§ 185. Every member in an ordinary *trading* copartnership is moreover presumed to be intrusted with a general authority to enter into contracts on behalf of the firm for the usual purposes of the business,[2] and, consequently, to be empowered to borrow money, and to contract or pay debts, on account of the partnership, and to make, draw, indorse, and accept negotiable securities in the firm's name.[3] Similar powers, however, are not presumed to exist in the case of mining copartnerships. Accordingly one of several co-adventurers in a mine has no authority, as such, to negotiate any bill on behalf of his fellows,[4] or to pledge the credit of the general body for money borrowed for the purposes of the concern.[5] Still less have the members of a firm, not established for trading purposes (as, for example, a firm of solicitors) any implied authority to bind each other by drawing or indorsing bills of exchange, or making promissory notes or even post-dated cheques.[6] Nor in an ordinary partnership has one member of a firm power to bind the others by contracts *out* of the ordinary mode of the partnership dealings, merely because they are reasonable acts towards effecting the partnership purposes.[7] Consequently, where a partner signed a guarantee in the name of the firm for the purpose of giving effect to a transaction within the scope of the partnership dealings, it was, in the absence of proof of any usage, and of any recognition by the other partners,

[1] Farrar *v.* Beswick, 1836, 1 M. & Rob. 527.

[2] 53 & 54 V. c. 39, § 5.

[3] Jenkins *v.* Morris, 1847, 16 M. & W. 877, 880; Ex p. Darlington, &c. Bank Co., Re Riches and Marshall's Trust Deed, 1864, 4 De G. J. & S. 581; Story, Part. §§ 102, 124, 125; Bk. of Australasia *v.* Breillat, 1847, 6 Moo. P. C. C. 152. See Maclae *v.* Sutherland, 1854, 23 L. J. Q. B. 229.

[4] Dickinson *v.* Valpy, 1829, 10 B. & C. 128.

[5] Ricketts *v.* Bennett, 1847, 17 L. J. C. P. 17; Burmester *v.* Norris, 1851, 21 L. J. Ex. 43. See In re German Mining Co., 1853, 22 L. J. Ch. 926; and post, § 1185 ad fin.

[6] Forster *v.* Mackreth, 1867, 22 L. J. Ch. 926; Hedley *v.* Bainbridge, 1842, 11 L. J. Q. B. 293; Garland *v.* Jacomb, 1873, L. R. 8 Ex. 216.

[7] See Bishop *v.* Countess of Jersey, 1854, 23 L. J. Ch. 483.

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held that the firm was not bound by the guarantee.[1] Had any evidence been given of the adoption of the act by the other partners, the result would, of course, have been different.[2]

§ 186. Presumptions are also made in the law of *agency*. Thus, when a seller deals with an agent resident in this country, and acting for a foreign principal, he is presumed not to contract with the foreigner, but to simply trust the party with whom he actually makes the bargain.[3] This, however, is at best[4] a mere presumption of fact, liable to be rebutted by any evidence, whether extrinsic or intrinsic, that credit was intended to be given to the foreign principal.[5]

§ 187. One or two presumptions also attach to particular trades, having been originally founded on principles of public policy.[6] Thus with regard to *common carriers*. If goods intrusted[7] to a common *carrier* be lost or damaged, the law will conclusively presume that the carrier has been guilty of negligence, unless he can show that the loss or damage was occasioned by "the act of God," or by the King's enemies.[8] Similarly the loss of goods while under the custody of a stage-coachman, a cabman, or even a gratuitous bailee, raises a primâ facie inference of want of care which, in the absence of evidence to the contrary, renders the bailee liable to an action,[9] and damage to goods where

[1] Brettel *v.* Williams, 1849, 19 L. J. Ex. 123; overruling Ex p. Gardom, 1808, 15 Ves. 286. See also Hasleham *v.* Young, 1844, 13 L. J. Q. B. 205; Duncan *v.* Lowndes, 1813, 3 Camp. 478. One partner, too, has no implied authority to bind another by submission to arbitration. Hatton *v.* Royle, 1858, 27 L. J. Ex. 486.

[2] Sandilands *v.* Marsh, 1819, 2 B. & Ald. 673. See Maclae *v.* Sutherland, 1854, 23 L. J. Q. B. 229.

[3] Heald *v.* Kenworthy, 1855, 24 L. J. Ex. 76.

[4] It is put too strongly by Mr. Justice Story in Story, Agen. § 290.

[5] Green *v.* Kopke, 1856, 25 L. J. C. P. 297; Mahoney *v.* Kekulé, 1854, 23 L. J. C. P. 54.

[6] Best, Ev. 528—530.

[7] The rule does not extend to a passenger's luggage placed in the same carriage with him on a railway; and if such luggage be lost or injured the company will only be liable for the damage on *proof* of the negligence of their servants. Bergheim *v.* Gt. East. Ry. Co., 1878, 3 C. P. D. 221 (C. A.).

[8] Ross *v.* Hill, 1846, 15 L. J. C. P. 182; Coggs *v.* Bernard, 1704, 2 Ld. Raym. 918. See post, § 1172. The Scotch law on this subject is now embodied in § 17 of 19 & 20 V. c. 60, which enacts, that "all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire, while such goods are in the custody or possession of such carriers."

[9] Ross *v.* Hill, 1846, 2 C. B. 890; Harris *v.* Costar, 1825, 1 C. & P. 637; Mackenzie *v.* Cox, 1840, 9 C. & P. 632; Reeve *v.* Palmer, 1858, 5 C. B. (N.S.) 84; Coggs *v.* Bernard,

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§ 187. the damage is inconsistent with reasonable care having been taken may raise a similar inference.[1] Where, however, the damage is equally consistent with some other cause, as in the case of the carriage of living animals, which may have become injured by their own restiveness,[2] the plaintiff must give affirmative evidence of some act of negligence causing the damage.[3] In the case of a gratuitous bailee the want of care necessary to entail liability is "the want of that ordinary diligence which a reasonably prudent man takes of his own property of the like description."[4] Again, with regard to innkeepers. Where chattels not exceeding in value the sum of thirty pounds,[5] have been lost by a guest[6] in a public inn, or injured there,—and the term inn seems to include a hotel, a tavern, a coffee-house,[7] a restaurant attached to a hotel, but not a railway refreshment

1704, 1 Sm. L. C. 201; and see Gt. North. Ry. Co. *v.* Sheppard, 1852, 8 Ex. 30.

[1] Czech *v.* Gen. Steam Nav. Co., 1867, L. R. 3 C. P. 14.

[2] Harris *v.* Midland Ry. Co., 1876, 25 W. R. 63; Smith *v.* Midland Ry. Co., 1888, 57 L. T. 813.

[3] The law on this subject has given rise to some difference of opinion, Story, J. (Am.), in his treatise on the Law of Bailments, was of opinion that by English law proof of actual negligence must always be given in actions founded on either loss or injury. See §§ 410, 454. By a note to § 410 in the recent editions of his work, however, it appears that the tendency of the recent American decisions is to throw upon the bailee the obligation to explain the loss or damage. See also Finucane *v.* Small, 1795, 1 Esp. 316; Cooper *v.* Barter, 1810, 3 Camp. 5, n.; Marsh *v.* Horne, 1826, 5 B. & C. at p. 327; Harris *v.* Packwood, 1810, 3 Taunt. 264.

[4] Gitlin *v.* McMullen, 1868, L. R. 2 P. C. 317; and for the distinction between the liability of a gratuitous bailee and a bailee for reward, see the judgment of Rolfe, B., in Wilson *v.* Butt, 1843, 11 M. & W. at p. 115.

[5] The common law liability of innkeepers has been restricted by 26 & 27 V. c. 41 ("The Innkeepers Liability Act, 1863"), and is now limited to 30*l.*, save as to goods deposited for safe custody, and as to horses and carriages, if the inn has a copy of § 1 of the Act exhibited in a conspicuous part of its hall or entrance. As to the construction of the Act, there is a case of Moss *v.* Russell, 1884, 1 Times L. R. 13 (C. A.). See, as to this point, Spice *v.* Bacon, 1877, 2 Ex. D. 463 (C. A.).

[6] The depositor must be a guest. See as to what constitutes a guest, Strauss *v.* County Hotel Co., 1883, 12 Q. B. D. 27.

[7] Thompson *v.* Lacy, 1820, 3 B. & Ald. 283; Turrill *v.* Crawley, 1849, 18 L. J. Q. B. 155. § 4 of 26 & 27 V. c. 41 ("The Innkeepers Liability Act, 1865"), interprets the word "inn" as meaning "any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests." See Doe *v.* Laming, 1814, 4 Camp. 76; and R. *v.* Rymer, 1877, 2 Q. B. D. 136. A boarding-house or lodging-house keeper has no duty imposed upon him by law to take care of his lodgers' goods. Holder *v.* Soulby, 1860, 29 L. J. C. P. 246; Dansey *v.* Richardson, 1854, 23 L. J. Q. B. 217.

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room communicating with a hotel by a passage,[1]—the primâ facie presumption is that the loss or injury was occasioned by the negligence, or, at least, through the defect, of the innkeeper or his servants:[2] but on proof that it was caused by the negligence of the guest, the landlord's responsibility will cease.[3] The salaried manager of a hotel belonging to a company, is not regarded as an "innkeeper" within this rule, though the hotel licence may have been granted to himself personally.[4] The liability of the innkeeper attaches so long only as the guest remains a "traveller."[5]

§ 188. A presumption of negligence sometimes may be made (if a jury think fit) from the *mere happening of an accident* if it be one which, in the ordinary course of things, does not happen to those who use proper care in the management of their business, and therefore affords reasonable evidence of negligence, in the absence of any explanation by the defendant.[6] For example, this has been done where the injury complained of was caused, either by a collision between two railway trains belonging to the same company,[7] by a railway carriage having, during the journey, unaccountably left the rails,[8] or by a barrel of flour falling on a man out of a warehouse window while he was walking in the street below.[9] On the other hand, where a ladder, inside a private house, from some unexplained cause fell against an upper window and broke it, and the glass in falling damaged the eye of a person passing by, the proof of these facts alone was held insufficient to fix the owner of the house with negligence.[10]

[1] Orchard *v.* Bush, [1898] 2 Q. B. 284.

[2] Dawson *v.* Chamney, 1843, 13 L. J. Q. B. 33; Morgan *v.* Ravey, 1861, 30 L. J. Ex. 131; Richmond *v.* Smith, 1830, 8 B. & C. 9; Burgess *v.* Clements, 1815, 4 M. & Sel. 306; Armistead *v.* Wilde, 1851, 20 L. J. Q. B. 524; Calye's case, 1583, 8 Co. Rep. 32 *a*; Day *v.* Bather, 1863, 32 L. J. Ex. 171.

[3] Armistead *v.* Wilde, 1851, 20 L. J. Q. B. 524; Cashill *v.* Wright, 1856, 6 E. & B. 891; Morgan *v.* Ravey, 1860, 30 L. J. Ex. 131; Filipowski *v.* Merryweather, 1860, 2 F. & F. 285; Oppenheim *v.* White Lion Hotel Co., 1871, L. R. 6 C. P. 515; Spice *v.* Bacon, 1877, 2 Ex. D. 463 (C. A.).

[4] Dixon *v.* Birch, 1872, L. R. 8 Ex. 135.

[5] Lamond *v.* Richard, [1897] 1 Q. B. 541.

[6] Cases cited infra, note [10].

[7] Skinner *v.* Lond. & Brighton Ry. Co., 1850, 5 Ex. 787.

[8] Flannery *v.* Waterf. & L. Ry. Co., 1877, Ir. R. 11 C. L. 30.

[9] Byrne *v.* Boadle, 1863, 33 L. J. Ex. 13; Scott *v.* Lond. Dock Co., 1865, 34 L. J. Ex. 220; Kearney *v.* Lond. & Brigh. Ry. Co., 1871, L. R. 5 Q. B. 411; 6 Q. B. 759 (Ex. Ch.).

[10] Higgs *v.* Maynard, 1866, 14

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And the mere happening of an accident does not raise a presumption that an injury, which was caused to a person by his acting with rashness to avoid an imaginary danger, that he erroneously supposed had arisen owing to such accident, is attributable to the negligence which originally occasioned such accident.[1] Indeed, an accident will not be *presumed* to have been attributable to it in all cases where negligence by the defendant is proved. If the facts are equally consistent with its having been caused by some voluntary act of the plaintiffs, a case should only be left to the jury (1) where the circumstances make it a question *of fact* whether such voluntary act of the plaintiff was negligent or not; or (2) where the circumstances are such that an inference that the defendant could, by reasonable care, have avoided the accident would not be unreasonable.[2]

§ 189. Various primâ facie and disputable presumptions arise, again, in respect of *infants*. Thus, infants between seven years and fourteen are primâ facie presumed to be unacquainted with guilt, and therefore cannot be convicted, unless the jury shall be satisfied from the evidence, that, when the offence was committed, they had a guilty knowledge that they were doing wrong.[3] This rule, though perhaps originally adopted in favorem vitæ with respect to capital offences only,[4] has for many years past been expressly held applicable to all felonies.[5] There seems no reason, on principle, why it should not also be extended to misdemeanors, with the exception, perhaps, of those where an infant occupier of lands, charged with the repair of a bridge or road, might be indicted for non-repair.[6] The test of juvenile exemption propounded by Lord Hale, is whether the accused was capable of discerning "between good and evil."[7] These words are

L. T. 332; Welfare *v.* Lond. & Brigh. Ry. Co., 1869, L. R. 4 Q. B. 693. See Moffatt *v.* Bateman, 1869, L. R. 3 P. C. 115.

[1] Kearney *v.* Gt. Southern & Western Ry. Co., 1866, 18 L. R. Ir. 303. Compare Jones *v.* Boyce, 1816, 1 Stark. R. 493; Davey *v.* London & S. W. Ry. Co., 1883, 12 Q. B. D. 70.

[2] Coyle *v.* Great North of Ireland Ry. Co., 1887, 20 L. R. Ir. 409. And see Smith *v.* S. E. Ry. Co., [1896] 1 Q. B. 178 (C. A.); and Wakelin *v.* L. & S. W. Ry. Co., 1886, 12 A. C. 41 (H. L.). For the judgments delivered in the C. A., see [1896] 1 Q. B. 189, n.

[3] Russ. C. & M. 1—5.

[4] 1 Hale, c. 3.

[5] R. *v.* Owen, 1830, 4 C. & P. 236.

[6] R. *v.* Sutton, 1835, 3 A. & E. 597, 612.

[7] 1 Hale, 27.

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sufficiently indefinite, since they may apply either to legal responsibility or to moral guilt;[1] and many children of tender years, though perfectly well aware that it is wrong to take what does not belong to them (who are consequently, according to this test, fit subjects for punishment), may yet be only partially acquainted with the sinful nature of theft, and be wholly ignorant that it is a crime against the law of the land.[2]

§ 190. The law also recognises certain presumptions with respect to *married women*. Thus, if a wife commit a felony, in the presence of her husband, the law in general presumes that she acted under his coercion, and consequently without any guilty intent. The mere fact that the parties are married gives rise, however, to no such presumption.[3] Some felonies are exempted from this presumption on account of their heinous character, such as murder and treason. Some doubt arises upon the authorities as to what crimes are so exempted. The right conclusion seems to be that all felonies are subject to this presumption in the absence of authority to the contrary.[4] It is

[1] See 30 Law Mag. 24, and article on M'Naughten's trial in Leg. Obs. for May 27, 1843, as to the dangerous and unphilosophical nature of this test.

[2] The loose and unsatisfactory manner in which this merciful presumption of infantile innocence has —at least in former years—been practically rebutted, cannot be more clearly exposed than by referring to a statistical return of juvenile delinquents, published in the reign of Queen Victoria. By these it appears that, out of 297 children under the age of fifteen, committed in the metropolis alone during a single year, 238 were actually convicted; and of these no fewer than 36 were sentenced to transportation. See Porter's Statist. Tables, Part 14, pp. 149, 151, 152, 163. In 1844, 1,596 children, under the age of fifteen, were committed for trial in England and Wales. Porter's Progress of Nation, p. 656.

[3] Brown *v.* A.-G. of New Zealand, [1898] A. C. 234; Bracton, Bk. III., ch. 32; R. *v.* Baines, 1900, 19 Cox, C. C. 524.

[4] The law on this point was reviewed in the case of R. *v.* Cruse, 1838, 8 C. & P. 545. Lord Hale in his Pleas of the Crown, vol. i., pp. 45—47, extends the doctrine to all cases, excepting treason and murder, but in later passages further excepts manslaughter: pp. 434, 516. Mr. Serjeant Hawkins makes the exceptions treason, murder, and robbery: 1 Hawk. Pleas of the Crown 1, 4. For the exclusion of robbery there seems to be no authority, and in Cruse's case an authority is referred to in which a contrary view was taken. It was decided, in the reign of Charles II., by twelve judges (Kel. p. 31), that the presumption applied in cases of burglary, the marginal note being, "Husband and wife commit larceny or felony together, no felony in wife but only the husband is guilty, otherwise in case of murder both guilty." Mr. Justice Blackstone, in the first volume of his Commentaries, only excepts treason and murder (ch. 15), but in his fourth volume (ch. 2) excepts crimes that are mala in se and prohibited by the law of nature, as murder and the like, which is

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a presumption which may be rebutted by the circumstances of the case or direct evidence, in the event of which the question should be left to the jury whether the part taken by the wife showed she was exercising her own free will or whether she was coerced by her husband at the time.[1]

§ 191. It was at one time doubtful whether this doctrine of coercion extends to any misdemeanors. But the considered opinion seems to be that the wife will be protected in like manner as in cases of felonies. The origin of the presumption in cases of felony was thought by some authorities to be the fact that the husband, if he could read, was entitled to benefit of clergy, a benefit a woman could not claim, and that therefore upon a conviction of both for the same offence, the wife might be executed, while her husband escaped;[2] but the theory of coercion has been recognised in law from the earliest times,[3] and logically there seems no reason why it should not be extended to cases of misdemeanor. Before 1838 this presumption was recognised in the misdemeanor of uttering base coin.[4] In 1838,

certainly going too far. In a case of R. *v.* Atkinson, Old Bailey, Jan. Sessions, 1814, cited in Russell on Crimes and Misdemeanors, vol. i., p. 147, the doctrine was extended to forgery. In R. *v.* Smith, 1857, 1 Dears. & Bell, 883, the doctrine was extended to feloniously wounding with intent to disfigure, and in R. *v.* Dykes, 1885, 15 Cox, C. C. 771, to highway robbery with violence. In the last edition of Russell on Crimes, p. 146, 6th ed., the editor expresses some doubt as to whether the exceptions of treason and murder are not merely founded upon the theories of the above writers without sufficient consideration. In Somerville's case, 1 And. 104, decided in Queen Elizabeth's reign, the only case in which husband and wife were convicted of treason, the question of coercion does not seem to have arisen; and in Somersett's case, 1615, 2 St. Trials, 957, a case of murder, the same remark applies. In the more recent case of R. *v.* Manning, 1849, 2 C. & K. 887, where husband and wife were convicted of murder, the wife took a more active part in the murder than the husband; but the Recorder, in his charge to the Grand Jury at the C. C. C., adopts the theories of the text-writers. There is an old case cited by Patteson, J., in R. *v.* Alison, 1838, 8 C. & P. 423, where husband and wife agreed to commit suicide and took poison. The husband died and the wife recovered. She was tried for murder and acquitted on the ground that she acted under the coercion of her husband. But in spite of this case, cited in Russell on Crimes and M., 6th ed., the weight of authority seems to be against the theory in support of which it is cited.

[1] R. *v.* Torpey, 1871, 12 Cox, C. C. 45.

[2] R. *v.* Hughes, 1813, 2 Lew. C. C. 219.

[3] As far back as the Laws of Ina, King of the West Saxons, who reigned in the year 712. See Wilkin's Leges Anglo-Sax., at p. 24, and art. 57.

[4] R. *v.* Connolly, 1829, 2 Lew. C. C. 229; R. *v.* Price, 1837, 8 C. & P. p. 19.

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in a case which was argued before twelve judges,[1] it is reported to have been held that this doctrine did not apply to misdemeanors, but it may be that the court only decided that it did not apply to the particular misdemeanor considered, namely, assault. The decision seems to have been influenced by an old case[2] in which the question of coercion does not seem to have been raised. In 1871 that distinguished criminal lawyer, then Recorder of London, Mr. Russell Gurney, after having his attention called to the case of R. *v.* Cruse, held, after consulting Baron Bramwell, that there was no such distinction as suggested between cases of felony and misdemeanor,[3] and this is the view of the law now acted upon.

§ 192. The following primâ facie presumptions exist with regard to a husband's liability for debts contracted by his wife; where goods are supplied to family or wife, on the order of a man's wife, who is living with him at the time, and the articles are neither excessive in quantity, improvident in quality, nor extravagant in price, it is, in the absence of evidence to the contrary, presumed that the wife was the husband's agent to order such goods;[4] but, although by the Married Women's Property Act, 1893, a wife is enabled to contract in respect of her separate estate, there is no presumption of any joint liability.[5] This presumption may always be rebutted by proof that the husband, while supplying his wife with an adequate allowance, has expressly forbidden her to pledge his credit even for necessaries; and that, too, though the tradesman may have had no knowledge whatever of the husband's prohibition.[6] If, indeed, the debt has been incurred by the wife while living

[1] R. *v.* Cruse, 1838, 8 C. & P. 541.

[2] R. *v.* Ingram, 1705, 1 Salk. 384.

[3] R. *v.* Torpey, 1871, 12 Cox, C. C. 45.

[4] Lane *v.* Ironmonger, 1844, 14 L. J. Ex. 35; recognising Freestone *v.* Butcher, 1840, 9 C. & P. 647; Atkins *v.* Curwood, 1837, 7 C. & P. 757; Johnston *v.* Sumner, 1858, 27 L. J. Ex. 341; Morgan *v.* Chetwynd, 1865, 4 F. & F. 451; Waithman *v.* Wakefield, 1807, 1 Camp. 120; Manby *v.* Scott, 1660, 1 Lev. 40. See Reneaux *v.* Teakle, 1853, 22 L. J. Ex. 241; Phillipson *v.* Hayter, 1870, L. R. 6 C. P. 38; Moylan *v.* Nolan, 1864, 17 Ir. C. L. R. 427; Reid *v.* Teakle, 1853, 22 L. J. Ex. 241; Ruddock *v.* Marsh, 1857, 1 H. & N. 601; Jewsbury *v.* Newbold, 1857, 26 L. J. Ex. 247; and post, §§ 770, 771. See also post, § 842.

[5] Morel *v.* Westmoreland, [1904] A. C. 11.

[6] Debenham *v.* Mellon, 1880, 6 App. Cas. 24 (H. L.); Jolly *v.* Rees, 1864, 33 L. J. C. P. 177; Ryan *v.* Nolan, 1864–5, Ir. R. 3 C. L. 319; Jetley *v.* Hill, 1884, C. & E. 239.

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§§ 192, 193. separate from her husband, the doctrine of presumptive agency will depend on the cause of separation. Should the wife have been turned out of doors or deserted by the husband, or have left him because his misconduct rendered it impossible for her to remain under his roof,[1] she has an implied authority to pledge his credit for necessaries,[2] whether supplied to herself or to her infant child,[3] unless by an adequate[4] allowance from her husband, or by the terms of her settlement, or perhaps by her own exertions, she be in a position to provide for her maintenance.[5] On the other hand, a wife who leaves her husband without his consent, and without justifiable cause, has no authority to bind him by her contracts.[6] Where husband and wife have parted by mutual consent, and the wife has afterwards incurred a debt for articles suitable to her degree, the creditor, to recover from the husband, must affirmatively show either an express authority from him, or at least such circumstances as will justify the jury in implying an authority; for instance, that the wife has been left without adequate means of support, or that an allowance promised to her by the husband has not been paid,[7] or that he has ratified the contract of the wife leading to the debt in question. Under any circumstances, too, the authority of a wife to pledge her husband's credit is no greater when he is a lunatic than when he is sane.[8]

§ 193. Moreover, though a wife has often an implied authority from her husband to procure goods on credit, an English court would never, under the old system, presume that she was his agent for the purpose of *borrowing money;* and this even though she were turned out of doors without any misconduct on her

[1] Bazeley *v.* Forder, 1868, L. R. 3 Q. B. 562.

[2] Wilson *v.* Ford, 1868, L. R. 3 Ex. 63. As to how far this doctrine applies to cases where the wife has retained a solicitor to act for her in divorce or other legal proceedings against her husband, see Ottaway *v.* Hamilton, 1878, 3 C. P. D. 393 (C. A.); Mecredy *v.* Taylor, 1873, Ir. R. 7 C. L. 256; Shepherd *v.* Mackoul, 1813, 3 Camp. 326; Brown *v.* Ackroyd, 1856, 25 L. J. Q. B. 193; Grindell *v.* Godmond, 1836, 5 A. & E. 755.

[3] Bazeley *v.* Forder, 1868, L. R. 3 Q. B. 562.

[4] Baker *v.* Sampson, 1863, 14 C. B. (N.S.) 383.

[5] Johnston *v.* Sumner, 1858, 27 L. J. Ex. 341.

[6] Id.

[7] Johnston *v.* Sumner, 1858, 27 L. J. Ex. 341; Biffin *v.* Bignell, 1862, 31 L. J. Ex. 189; Eastland *v.* Burchell, 1870, 3 Q. B. D. 432. See Manby *v.* Scott, 1660, 1 Lev. 4.

[8] Richardson *v.* Dubois, 1869, L. R. 5 Q. B. 51. See Drew *v.* Nunn, 1879, 4 Q. B. D. 661 (C. A.).

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part, and without any means of livelihood, and notwithstanding she might have expended the whole of it in procuring the actual necessaries of life.[1] But a creditor who had been nonsuited at common law in pursuance of this doctrine might succeed in equity before a vice-chancellor.[2] The rules of equity will, in future, prevail on this subject.[3]

§ 194. In matrimonial suits for nullity of marriage, where the marriage has not been consummated, and no visible defect is proved to exist in either party,[4] the court will presume impotence after a period of ineffectual cohabitation, and will infer incapacity from continued resistance of marital intercourse. The period of cohabitation necessary before this presumption arises has been fixed at three years,[5] but the courts have, in some recent cases, granted decrees for nullity after a shorter period of cohabitation, notwithstanding the absence of physical defect, where it has been proved that the conduct of the respondent is such, that further cohabitation would be unavailing,[6] in one case, indeed, after only five months of cohabitation, ineffectual in consequence of the wife's resistance.[7] This rule only applies where the impotence is not otherwise proved, but is left to be presumed from continual non-consummation; and the court will never rely on this rule of presumption when other evidence on the subject can be obtained.[8]

§ 195. The presumptions with respect to *parent* and *child* are not very important. If a parent and a child both bear the same Christian and surname, and this name occur in an instrument without any addition of "senior" or "junior," it will be presumed, in the absence of evidence to the contrary, that the

[1] Knox *v.* Bushell, 1857, 3 C. B. (N.S.) 334.

[2] Jenner *v.* Morris, 1861, 30 L. J. Ch. 361. See Re Wood's Estate, 1863, 32 L. J. Ch. 400.

[3] See "The Judicature Act, 1873," (36 & 37 V. c. 66), § 25, sub-sect. 4. The old law in Ireland was as it formerly was in equity in England. Johnson *v.* Manning, 1860, 12 Ir. C. L. R. 148.

[4] See D., falsely called F. *v.* F., 1864, 34 L. J. P. & M. 66; B., falsely called B. *v.* B., 1875, Ir. R. 9 Eq. 551.

[5] M., falsely called H. *v.* H., 1864, 33 L. J. P. & M. 159; Lewis, falsely called Hayward *v.* Hayward, 1865, 35 L. J. P. & M. 105, (H. L.); and see S. *v.* A., otherwise S., 1878, 3 P. D. 72 (Sir J. Hannen, P.).

[6] G. *v.* G., 1871, L. R. 2 P. 257 (Ld. Penzance).

[7] F. *v.* P., falsely called F., 1896, 75 L. T. 192 (Sir F. Jeune, P.).

[8] F., falsely called D. *v.* D., 1865, 34 L. J. P. & M. 66.

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§§ 195, 196.

parent was intended.[1] For example, if a legacy be left, or a note be made payable, to John Holland, and there be two of that name, father and son, the law, primâ facie, presumes that the father is the legatee or payee. This presumption may, however, readily be rebutted, as for instance, in the case of the will, by proving that the testator did not know the father,[2] or in the case of the note, by showing that the son had had it in his possession, or had indorsed it, or had given instructions to bring an action upon it.[3] No presumption of a promise to pay a debt contracted by the child for necessaries is made from the mere moral obligation of a parent to maintain his child.[4]

§ 196.[5] Various primâ facie legal presumptions are founded on the *continuance*, or immutability, for a longer or shorter period, of human affairs, which experience tells us usually occurs.[6] For instance, when the existence of a person, or personal relation, or a state of things, is once proved, the law presumes that the person, relation, or state of things continues to exist till the contrary is shown, or till a different presumption is raised, from the nature of the subject.[7] For example, where a jury found that a certain custom existed up to 1689, it was held, that, in the absence of all evidence of its abolition, this was in legal effect a verdict finding that the custom still subsisted in 1840;[8] in settlement cases, unless there be some evidence to the contrary, it will be presumed that a son, though long since arrived at manhood, has continued unemancipated,[9] and that the settlement of a pauper,[10] or the appointment of a party to an official situation, continues in force for, at least, a reasonable

[1] Stebbing *v.* Spicer, 1849, 19 L. J. C. P. 24; Lepiot *v.* Browne, 1703, 1 Salk. 7; Sweeting *v.* Fowler, 1815, 1 Stark. R. 106; Jarmain *v.* Hooper, 1843, 13 L. J. C. P. 63.

[2] Lepiot *v.* Browne, 1703, 1 Salk. 7.

[3] Stebbing *v.* Spicer, 1849, 19 L. J. C. P. 24; Sweeting *v.* Fowler, 1815, 1 Stark. R. 106.

[4] Shelton *v.* Springett, 1851, 11 C. B. 452; recognising Mortimore *v.* Wright, 1840, 9 L. J. Ex. 158; and overruling Baker *v.* Keene, 1819, 2 Stark. R. 501; Blackburn *v.* Mackey, 1823, 1 C. & P. 1; Law *v.* Wilkin, 1837, 6 A. & E. 718. See Bazeley *v.* Forder, 1868, L. R. 3 Q. B. 562.

[5] Gr. Ev. § 41, as to first seven lines.

[6] See argument in Blandy *v.* De Burgh, 1848, 18 L. J. C. P. 2.

[7] See Price *v.* Price, 1847, 16 L. J. Ex. 99; overruling Mercer *v.* Cheese, 1842, 12 L. J. C. P. 56. See also The Gananoque, 1862, Lush. 448.

[8] Scales *v.* Keyes, 1840, 11 A. & E. 819.

[9] R. *v.* Lilleshall, 1845, 14 L. J. M. C. 97, explaining R. *v.* Oulton, 1835, 3 L. J. M. C. 33.

[10] R. *v.* Tanner, 1795, 1 Esp. 306.

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time;[1] a partnership, agency, tenancy,[2] or other similar relation, once shown to exist, is presumed to continue, till it is proved to have been dissolved.[3] From the presumption of a continuance of a state of things once shown to exist, it follows that when a business is carried on by partners after the expiration of the term limited by the articles, it is primâ facie presumed, that such of the provisions of the articles as are not inconsistent with a partnership at will, continue to apply:[4] if a tenant hold over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation[5]—and this, though the rent has been advanced,[6] or though the original lessor has assigned his interest to a third party, or, being a clergyman, has resigned his living, and a fresh incumbent has succeeded him;[7] and that if a man on several occasions authorise his mistress to order goods from a tradesman on his credit, he is liable for articles supplied after the termination of the connexion, unless the tradesman knew of such termination.[8]

§ 197. The continuance of a debt once shown to have existed, is presumed, in the absence of proof of payment, or some other discharge.[9] It is also presumed, till the contrary appears, that opinions,[10] which individuals once entertained and expressed, and that a state of mind on their part once proved to

1 R. *v.* Budd, 1805, 5 Esp. 230.

2 See Pickett *v.* Packham, 1869, L. R. 4 Ch. 190 (C. A.).

3 Clark *v.* Alexander, 1844, 13 L. J. C. P. 133, where a partnership admitted to exist in 1816 was presumed to continue in 1838. See also Alderson *v.* Clay, 1816, 1 Stark. R. 405; Blandy *v.* De Burgh, 1848, 18 L. J. C. P. 2; Parsons *v.* Hayward, 1862, 31 L. J. Ch. 666; and Brown *v.* Wren Bros., [1895] 1 Q. B. 390. So, by Hindoo law, a family once joint is presumed to retain that status, unless evidence can be given to show that it has become divided: Mussumat Cheetha *v.* Baboo Miheen Lall, 1867, 11 Moore, Ind. App. 369, 380.

4 And this, however difficult it may be to say what provisions fall within this description: Cox *v.* Willoughby, 1880, 13 Ch. D. 863; Clark *v.* Leach, 1863, 32 L. J. Ch. 290. See Woods *v.* Lamb, 1866, 35 L. J. Ch. 309.

5 Torriano *v.* Young, 1833, 6 C. & P. 8; Thomas *v.* Packer, 1857, 26 L. J. Ex. 207; 23 & 24 V. c. 154, § 5, Ir. But see Oakley *v.* Monck, 1865, L. R. 1 Ex. 159 (Ex. Ch.).

6 Digby *v.* Atkinson, 1815, 4 Camp. 275, explained in Johnson *v.* St. Peter, Hereford, 1836, 4 A. & E. 525.

7 Hutton *v.* Warren, 1836, 5 L. J. Ex. 234. See Thetford *v.* Tyler, 1845, 15 L. J. Q. B. 33.

8 Ryan *v.* Sams, 1848, 17 L. J. Q. B. 271.

9 Jackson *v.* Irvin, 1809, 2 Camp. 50.

10 Gr. Ev. § 42

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§§ 197, 198. exist, remain unchanged.[1] Every man who has once been sane is presumed to be still of sound mind till the contrary is shown.[2]

§ 198. It is on the above principles also a presumption of law that a person shown to have once been living is, by English law, in the absence of proof that he has not been heard of within the last seven years, presumed to be still alive:[3] until a time considerably exceeding the ordinary duration of human life has elapsed. In the civil law the presumption of life ceases at the expiration of one hundred years from the date of the birth,[4] and the same rule appears to have been adopted in Scotland.[5] In England, however, no definite period has been fixed, at the end of which the presumption of a continuance of life ceases. In several old cases, however, the possibility of persons having survived the expiration of terms, periods varying from eighty to ninety-nine years, was neglected in determining the nature of remainders.[6] In an action of ejectment, where the plaintiff, to

[1] For instance, all members of a Christian community are presumed to believe the common faith till their acts or declarations evidence the contrary. See The State *v.* Stinson, 1844, 7 Law Reporter, 383 (Am.).

[2] Dyce Sombre *v.* Troup, 1856, Deane, Ecc. R. 38. In Sutton *v.* Sadler, 1857, 27 L. J. C. P. 284, this presumption was held to be one of *fact*, which ought not to influence the jury in a case of conflicting evidence. See also Anderson *v.* Gill, 1858, 3 Macq. 180 (H. L.); Crowninshield *v.* Crowninshield, 1854, 2 Gray, 524 (Am.). And on the other hand, where any derangement or imbecility is proved or admitted to have existed at any particular period, it is presumed to continue till disproved. See Att.-Gen. *v.* Parnther, 1792, 3 Bro. C. C. 443; Grimani *v.* Draper, 1848, 6 Notes of Cases, Ecc. & M. 421; Johnson *v.* Blane, 1848, 6 Notes of Cases, Ecc. & M. 457, 461; Dyce Sombre *v.* Troup, 1856, Deane, Ecc. R. 38; Prinsep and E. I. Co. *v.* Dyce Sombre, 1856, 10 Moo. P. C. C. 285; Nicholas and Freeman *v.* Binns, 1858, 27 L. J. P. & M. 6; Hassard *v.* Smith, 1872, Ir. R. 6 Eq. 429; Blake *v.* Johnson, 1819, Milw. Ecc. R. 164 (Ir.); Smith *v.* Tebbitt, 1867, L. R. 1 P. & D. 398, 434—unless, indeed, it be obviously of a partial or temporary character. See Walcot *v.* Alleyn, 1819, Milw. Ecc. R. 69 (Ir.); Legeyt *v.* O'Brien, 1834, Milw. Ecc. R. 334 (Ir.); Airey *v.* Hill, 1824, 2 Add. 209; White *v.* Wilson, 1806, 13 Ves. 87; Hall *v.* Warren, 1804, 9 Ves. 605.

[3] See however R. *v.* Lumley, 1869, L. R. 1 C. C. R. 196, cited ante, § 114.

[4] "Vivere etiam usque ad centum annos quilibet præsumitur, nisi pro mortuus." Corpus Juris Glossatum, tom. 2, p. 718, n. *q*; 1 Masc. de Prob. concl. 103, n. 5; Campegius Tract. de Test. reg. 350.

[5] Morison, Presump. xvi.. Carstairs *v.* Stewart, 1734; Hubb., Ev. of Suc. 168. Mr. Dickson in his Law of Evid. in Scotland, states, however, that "a precise limit to this presumption has not been fixed." 1 vol. p. 183. For other foreign laws on the same subject, see Hubb., Ev. of Suc. 758, 759.

[6] Weale *v.* Lower, 1672, Pollex. 67; Napper *v.* Sanders, 1628, Hutt. 119; Ld. Derby's case, 1592, Littleton, R. 370.

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§§ 198, 199.

prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume, not only that these persons were dead, but, in the absence of all evidence to the contrary, that they had died unmarried and without issue.[1] And whenever it becomes necessary to prove the exhaustion of remote branches of a family, the jury may safely be advised to act on very slight evidence, such, for example, as unanswered advertisements or ineffectual inquiries.[2] And in two other cases a book kept by a person has been admitted in evidence, without proof that any inquiries had been made for the writer, or as to his death, in the one case after the lapse of seventy-four years,[3] and in the other of fifty-four years only.[4]

§ 199. On the other hand, where a term was for sixty years, the court refused to presume the death of the termor at the expiration of that period, and recognised the possibility of his living after its expiration:[5] and where a person's deposition had been taken sixty years previously it was held that there was no presumption of his death, and it was refused to admit such deposition in evidence in the absence of any proof of search having been made for the deponent, or any account of him.[6]

[1] Doe *v.* Deakin, 1828, 8 B. & C. 22; Doe *v.* Wolley, 1828, 3 C. & P. 402. There Bayley, J., in stating that the jury had properly made this presumption, relied on the general rule, that things must be presumed to remain in the same state in which they were proved to have once been, unless there is some evidence of a subsequent alteration. 3 C. & P. 403. It is, however, submitted that the rule was in this case strained somewhat beyond its legitimate extent. If presumptions are founded, as they should be, on the experienced course of events, it was surely more probable that one out of four brothers should marry and have children, than that they should all die unmarried. In Doe *v.* Griffin, 1812, 15 East, 293, where a similar question arose, evidence *negativing the marriage* of the party, who was there presumed to have died without issue, was given; and in Richards *v.* Richards, 1731, 15 East, 294, n., where the plaintiff claimed as heir by descent, and proved the death of his elder brothers, the court held that he must further show that they died without issue, since in ejectment no presumption could be admitted against the person in possession. See In re Webb's Estate, 1870, Ir. R. 5 Eq. 235; Mullaly *v.* Walsh, 1872, Ir. R. 6 C. L. 314.

[2] Greaves *v.* Greenwood, 1877, 2 Ex. D. 289 (C. A.).

[3] Jones *v.* Waller, 1753, 3 Gwillim, 847. See also Doe *v.* Davis, 1847, 16 L. J. Q. B. 218.

[4] Doe *v.* Michael, 1851, 17 Q. B. 276.

[5] Beverley *v.* Beverley, 1690, 2 Vern. 131; Doe *v.* Andrews, 1850, 15 Q. B. 756.

[6] Benson *v.* Olive, 1732, 2 Str. 919; Manby *v.* Curtis, 1815, 1 Price, 225.

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§ 200. § 200. The presumption of life will, however, certainly on the one hand continue for a period exceeding half a century, unless proof be given either that the party has not been heard of by those persons who would naturally have heard of him had he been alive, or, at least, that search has been ineffectually made to find him.[1] On the other hand, if evidence be furnished of a person's continuous unexplained absence from home, and of the non-receipt of intelligence concerning him, after the lapse of *seven years*[2] the presumption of life ceases, and the burthen of proof is devolved on the party denying the death.[3] Thus, where a person whose life is insured has not been heard of for seven years, those who have effected the insurance are, at the end of that period, entitled to have it paid.[4] The fixing of this arbitrary period of seven years is explained by its having been inserted in the old statutes concerning leases for lives,[5] and since, by analogy, been adopted in other cases.[6] A period of seven years is also recognised in the various Acts relating to bigamy.[7] Under the last-named statutes on an indictment, if it appear that the

[1] Doe *v.* Andrews, 1850, 15 Q. B. 756.

[2] Gr. Ev. § 41, in part.

[3] Hopewell *v.* De Pinna, 1809, 2 Camp. 113; Rust *v.* Baker, 1837, 8 Sim. 443; Loring *v.* Steineman, 1840, 1 Metc. 204 (Am.). In Bowden *v.* Henderson, 1854, 2 Sm. & G. 360, the presumption of death after seven years' absence was held not to arise, if the probability of the exile sending intelligence home be rebutted by circumstances. See, also, M'Mahon *v.* M'Elroy, 1869, Ir. R. 5 Eq. 1; Prudential Ass. Co. *v.* Edmonds, 1877, 2 App. Cas. 487 (H. L.).

[4] Willyams *v.* Scottish Widows' Fund, 1888, 4 Times L. R. 489.

[5] 19 Car. 2, c. 6, § 2. See, also, 6 A. c. 18, entitled "An Act for the more effectual discovery of the death of persons pretended to be alive, to the prejudice of those who claim estates after their death." For the construction and practice under which, see In re Pople, Ex parte Baker, 1889, 40 Ch. D. 589.

[6] Doe *v.* Jesson, 1805, 6 East, 85; Doe *v.* Deakin, 1821, 4 B. & Ald. 433; King *v.* Paddock, 1820, 18 Johns. 141 (Am.). In Scotland the law on this subject is embodied in "The Presumption of Life Limitation (Scotland) Act, 1881" (44 & 45 V. c. 47). See especially § 8. In America it is not necessary that the party be proved to be absent from the United States; it is sufficient if it appears that he has been absent for seven years from the particular State of his residence, without having been heard of. Newman *v.* Jenkins, 1830, 10 Pick. 515 (Am.); Innis *v.* Campbell, 1829. 1 Rawle, 373 (Am.); Spurr *v.* Trimble, 1818, 1 A. K. Marsh. 271 (Am.); Wambough *v.* Shenk, 1807, 1 Penningt. 229 (Am.); Woods *v.* Woods, 1802, 2 Bay. 476 (Am.). In the New York Civ. Code, the presumption is thus briefly expressed:—"That a person not heard from in seven years is dead." § 1780. art. 26. As to cases where the presumption of life conflicts with that of innocence, see § 114, ante. Willyams *v.* Scottish Widows' Fund, 1888, 4 Times L. R. 489.

[7] 1 J. 1, c. 11, § 2; 9 G. 4, c. 31, § 22; 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 57.

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prisoner and his first wife lived apart for seven years before the second marriage, mere proof that the first wife was alive at the latter time will not warrant a conviction, but affirmative evidence that the accused was aware of this fact must be given.[1] Although, however, a person who has not been heard of for seven years, is presumed *to be dead*, the law raises no presumption as to the *time* of his death; and if any one who seeks to establish the precise period during those seven years, at which such person died, must do so by actual evidence.[2] So also, the burden of proving that the person was alive at any particular period within the seven years is upon the person asserting it.[3]

§ 201. Where, moreover, the facts reasonably raise such an inference, a person's death may be presumed to have taken place *before* a certain date,[4] and death may be presumed after the lapse of a shorter period than seven years—as for instance, if the party, when last heard of, was aged, or infirm, or ill,[5] or had since been exposed to extraordinary peril, such as a storm and probable shipwreck.[6] Although the presumption of the common

[1] R. *v.* Curwengen, 1865, L. R. 1 C. C. R. 1. See R. *v.* Jones, 1883, 52 L. J. M. C. 96.

[2] Connor, In the goods of, 1892, 29 L. R. Ir. 261; Re Rhodes, Rhodes *v.* Rhodes, 1887, 36 Ch. D. 586; Re Phene's Trusts, 1869, L. R. 5 Ch. 139 (C. A.); Re Lewes's Trusts, 1871, L. R. 6 Ch. 356, (C. A.); Re Corbishley's Trusts, 1880, 14 Ch. D. 846; Hickman *v.* Upsall, 1877, 4 Ch. D. 144 (C. A.); Lambe *v.* Orton, 1860, 29 L. J. Ch. 286; Pennefather *v.* Pennefather, 1872, Ir. R. 6 Eq. 171; Thomas *v.* Thomas, 1860, 2 Dr. & Sm. 298; In re Benham's Trusts, 1868, 37 L. J. Ch. 265; In re Peck, 1860, 29 L. J. P. & M. 95; In re Nichols, 1872, L. R. 2 P. & M. 461; Dunn *v.* Snowdon, 1863, 32 L. J. Ch. 104; Doe *v.* Nepean, 1833, 5 B. & Ad. 86; Elizabeth Howe, In the goods of, 1858, 1 Sw. & Tr. 53. In Nepean *v.* Doe *d.* Knight, 1847, 2 M. & W. 894 (Ex. Ch.), Ld. Denman, in the court's judgment, observes:—"It is true the doctrine will often practically limit the time for bringing the action of ejectment in such cases [viz., where the plaintiff claims as grantee in reversion of an estate]; and circumstances may be supposed, as of a lease for seven years, commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiries respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 M. & W. 913, 914.

[3] Re Benjamin, [1902] 1 Ch. 723 (Joyce, J.).

[4] See, for example, Sillick *v.* Booth, 1841, 11 L. J. Ch. 41; Ommaney *v.* Stillwell, 1856, 23 Beav. 328.

[5] R. *v.* Harborne, 1835, 2 A. & E. 540 (Ld. Denman); Re Beasney's Trust. 1869, L. R. 7 Eq. 498; Re Matthews, [1898] P. 17.

[6] Watson *v.* King, 1815, 4 Camp.

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§§ 201, 202.

law, independent of the finding of a jury, does not attach to the mere lapse of time short of seven years.[1]

§ 202.[2] Closely connected with the subject of the legal presumption as to the continuance of life is that of presumption as to *survivorship*, which may become important with regard to the devolution of property. Common instances, affording occasions for questions of survivorship arising, occur when two persons (especially when two relatives), *perish in the same calamity*, such as a wreck, a battle, or a conflagration. Direct proof can seldom be procured in these cases. In the Roman law, and in several other codes, recourse is had to *artificial* presumptions, whenever the particular circumstances connected with the deaths are wholly unknown, such presumptions being based on the probabilities of survivorship resulting from strength, age, and sex. Thus, if a father and son perish together in the same shipwreck or battle, Roman law presumed that the son died first, if he was under the age of puberty; but if he was above that age, that he was the survivor; the principle being, that in the former case, the elder is generally the more robust, and in the latter, the younger.[3] The French code has regard to the ages, and presumes that of those under fifteen the eldest survived; and that of those above sixty, the youngest survived; that if one of the parties were under the age of fifteen, and the other above the age of sixty, the former survived, and that if both parties were between those ages, but of different sexes, the male survived, unless he were more than a year younger than the female: but that if they were of the same sex, the survivorship of the younger must be presumed, as opening the succession in the order of nature.[4] The same rules were in force in the territory

272; Patterson *v.* Black, 1780, cited 2 Park, Ins. 919. In the case of a missing ship, bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly: In re Hutton, 1837, 1 Curt. 595.

[1] See further on this subject, Hubb. Ev. of Suc. 167 et seq., 758, 759.

[2] Gr. Ev. § 29, in part.

[3] Dig. lib. 34, tit. 5; De rebus dubiis, lib. 9, § 1, 3; Id. i. 16, 22. 23; Menoch. de Præs. lib. 1, Quæst. x. n. 8, 9. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

[4] Code Civil, §§ 720, 721, 722; Duranton, Cours de Droit Français, tom. 6, pp. 32, 42, 43, 48, 67, 69; Rogron, Code Civil, Expli. 411, 412; Touiller, Droit Civil Français, tom. 4. pp. 70, 72, 73.

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§§ 202, 203.

of Orleans, at the time of its cession to the United States, and have since been incorporated into the Code of Louisiana.[1] They have also, with some modifications, been adopted into the State of New York.[2]

§ 203. The law of England, however, in such cases recognises[3] no presumption, either of survivorship, or of contemporaneous death;[4] and in the total absence of all evidence respecting the particular circumstances of the calamity, treats the matter as one incapable of being determined.[5] If, indeed, any circumstances connected with the death of either party be proved, the question of survivorship may be dealt with *as one of fact*, and the comparative strength, or skill, or energy, of the two sufferers taken into account.[6]

[1] Civ. Code of Louis. art. 930—933; Dig. of Civ. L. of Orleans, art. 60—63.

[2] N. Y. Civ. Code, § 1780, tit. 3.

[3] Alston, In the goods of, [1892] P. 142; R. *v.* Dr. Hay, 1767, 1 W. Bl. 640. The latter case (known as General Stanwix's case) was compromised upon the recommendation of Ld. Mansfield, who said he knew of no legal principle on which he could decide it. See, 1767, 2 Phillim. R. 268, n.; Fearne's Posth. Works, 38; Doe *v.* Nepean, 1833, 5 B. & Ad. 86; Underwood *v.* Wing, 1854, 19 Beav. 459; affd. on appeal, 1856, 4 De G. M. & G. 1; Mason *v.* Mason, 1816, 1 Meriv. 308. See Durrant *v.* Friend, 1857, 21 L. J. Ch. 353; Barnett *v.* Tugwell, 1862, 31 L. J. Ch. 629. For the cases decided in the old Eccles. Courts, see Wright *v.* Netherwood, 1793, 2 Salk. 595, n.; more fully reported under the name of Wright *v.* Sarmuda, 1793, 2 Phillim. 266—277, n.; Taylor *v.* Diplock, 1815, 2 Phillim. 261, 278, 280; Selwyn's case, 1831, 3 Hagg. Ecc. 748; In the goods of Murray, 1837, 1 Curt. 596. In the brief note of Colvin *v.* Proc. Gen., 1827, 1 Hagg. Ecc. 92, where the husband, wife, and infant (if any) perished together, the Court seems to have held that the primâ facie presumption of law was that the husband survived; but the question was not much discussed; and in Satterthwaite *v.* Powell, 1838, 1 Curt. 705, where a husband and wife perished in the same wreck, the court would not presume that he survived, and consequently refused to grant to his representative the administration of property vested in the wife. The subject of presumed survivorship is fully treated in 4 Burge, Com. on Col. & For. L., 11—20; and in Hubb. Ev. of Suc. 116 et seq. and 759—764. See also 2 Kent, Com. 435, 436, 4th ed., n. *b*.

[4] By the Mahometan law of India, when relatives thus perish together, "it is to be presumed that they all died at the same moment; and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune." See Baillie's Moohummudan Law of Inherit. 172.

[5] Wing *v.* Angrave, 1860, 30 L. J. Ch. 65 (H. L.). And see In re Beynon, [1901] P. 141.

[6] In Sillick *v.* Booth, 1841, 11 L. J. Ch. 41, Knight Bruce, V.-C., held that a presumption of priority of death might be raised from the comparative age, strength, and skill of the parties; and accordingly, where two brothers perished by shipwreck, under the circumstances wholly unknown, the one twenty-eight years of age, and the master of the ship, while the other was under age, and acted as second mate, presumed that the elder, as the

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§§ 204, 205.

§ 204. A primâ facie presumption in insurance law is that, if a vessel has sailed, and no tidings of her have been received within a reasonable time, she is presumed to have *foundered* at sea.[1] By "tidings" are meant, not mere rumours, but some actual intelligence received from persons capable of giving an authentic account.[2] In an action on a policy from an English to a foreign port, the presumption of loss will arise, from proof that the ship was not heard of in this country after she sailed, without calling witnesses from the port of destination to show that she never arrived there.[3] Neither English law nor any general custom has fixed any *definite* period after which the assured may demand payment for his loss, in case no intelligence is received respecting the vessel insured; but among insurers a vessel is in practice treated as lost if she be not heard of within six months after departure for any port in Europe, or within twelve months for a greater distance.[4]

§ 205. Another presumption in insurance law is that if a ship, shortly after sailing, without visible or adequate cause, founders, or becomes leaky, or otherwise incapable of performing the voyage insured, she is deemed to have been unseaworthy, at the commencement of the risk.[5] This, however, is not really a

stronger and more experienced sailor, survived the younger. This case must, however, be taken not as laying down any rule *of law*, but as merely a finding *of fact*, under the particular circumstances.

1 Green *v.* Brown, 1744, 2 Str. 1199; Newby *v.* Reed, 1763, cited 1 Park, Ins. 48; Koster *v.* Reed, 1826, 6 B. & C. 22. But in order to recover on a policy, there must be some evidence that when the ship left the port of outfit she was bound upon the voyage insured. Cohen *v.* Hinkley, 1809, 2 Camp. 51; Koster *v.* Innes, 1825, Ry. & M. 333.

2 Koster *v.* Reed, 1826, 6 B. & C. 22, where the statement of a witness that a few days after the vessel sailed he *heard* that she had foundered, but that the crew were saved, was held not sufficient to rebut the presumption of loss which arose from the ship never having arrived at her port of destination, and not to oblige the plaintiff either to call any of the crew, nor to show that he was unable to do so.

3 Twemlow *v.* Oswin, 1809, 2 Camp. 85.

4 1 Park, Ins. 149. By the ordinances of Spain, if a ship insured on going to, or coming from the Indies, is not heard of within a year and a half after her departure from the port of outfit, she is deemed lost, 2 Magens. 33; by those of France, if the assured receives no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those of a greater distance, make his session to the underwriters, and demand payment, without being obliged to produce any certificate of the loss. Ordonnance de la Marine, liv. 3, t. 6, des Assur. Art. 58.

5 Watson *v.* Clark, 1813, 1 Dow. 344; Munro *v.* Vandam, 1794, cited 1 Park, Ins. 469; Parker *v.* Potts, 1815, 3 Dow. 23, H. L.; Ajum

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proposition of law, but simply an inference of fact which may be drawn by the intelligence of the jury,[1] and it is not so binding that the court will grant a third trial, after the verdict the other way by two special juries.[2]

§ 206. Certain presumptions are again, in maritime cases, made by the Admiralty Division of the High Court, which technically shift the burthen of proof. Thus, if two vessels come into collision, of which one was at anchor,[3] or "in stays"[4] at the time, the fact so far raises a presumption in her favour that she is so far *presumed* to be without blame; and the burthen of proof rests on the opposite side to establish, either that the other vessel was to blame or had been improperly put "in stays," or that the damage was occasioned by stress of weather, or by other unavoidable accident. Again, in the case of a collision between two ships, if the master of either ship fail to render assistance to the other, and to stay by her for that purpose, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by the wrongful act of the defaulter.[5] Moreover, the infringement of any regulation for preventing collisions at sea,[6] made under the Merchant Shipping Act, 1894,[7] raises a presumption of blame as against the infringer, unless he can show either that circumstances "made a departure from the regulation necessary,"[8] or that the infringement charged could not by possibility have contributed to the collision.[9] Again, if a salvor's vessel be injured or lost while engaged in a salvage service, the Admiralty Division presumes, primâ facie, that such

Goolam Hossen & Co. *v.* Union Marine Insce. Co., [1901] A. C. 362 (P. C.).

[1] Pickup *v.* Thames Ins. Co., 1878, 3 Q. B. D. 504 (C. A.).

[2] Foster *v.* Steele, 1837, 3 Bing. N. C. 82; Tindal, C.J., and Park, J.; Vaughan and Coltman, JJ., diss.).

[3] The Bothnia, 1860, 29 L. J. P. M. & A. 65.

[4] The Sea Nymph, 1860, Lush. Adm. 23.

[5] The Queen, 1869, L. R. 2 Adm. 354; 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 422.

[6] Made under Order in Council, gazetted 19th August, 1884.

[7] 57 & 58 V. c. 60, § 503 (1, 2).

[8] 57 & 58 V. c. 60, § 419 (3, 4). These words mean "absolutely necessary," leaving no margin for discretion: Stoomvaart, &c. *v.* Pen. & Orien. St. Nav. Co., 1880, 5 App. Cas. 876, H. L. But § 17 does not apply to an infringement of the Thames Rules: The Harton, 1884, 53 L. J. P. D. & A. 25.

[9] The Magnet, 1875, 44 L. J. Adm. 34; The Englishman, 1877, 3 P. D. 18; The Tirzah, 1878, 4 P. D. 33; Emery *v.* Cichero, Re The Arklow, 1883, 9 App. Cas. 136.

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§§ 206—208. injury or loss was caused by the necessities of the service, and not by the salvor's default.[1]

§ 207. Another presumption of maritime law, moreover, is in favour of the rights of property in the owners, whenever any question of derelict is mooted between them and the salvors. Therefore, where salvors make a claim, as in a case of dereliction, it will not suffice for them to merely prove that they found the vessel at sea apparently abandoned, but they must go further and prove that the master and crew, when they left the vessel, did so without any hope, expectation, or intention of being able to return, or, in the technical language of the law, sine spe recuperandi.[2]

§ 208. Another presumption of maritime law is that a ship-owner,—except so far as his liability is limited by the Merchant Shipping Acts, 1894 and 1900,[3]—is primâ facie responsible for any damage occasioned by negligence in the navigation of his vessel. To bring himself within the exemption from liability conferred upon him by the Act where pilotage is compulsory,[4] a

[1] The Thomas Blyth, 1860, Lush. Adm. 16; The Baku Standard, [1901] A. C. 549.

[2] In re Cosmopolitan, 1848, 6 Notes of Cases, Ecc. & Mar. Supp. xxviii. and cases there cited. The judgment of the court in this case is in accordance with the 33rd article of the laws of Oleron, "if from any ship or other vessel have been cast overboard several goods or merchandises which are in chests well locked and made fast; or books so well secured and so well conditioned that they may not be damnified by salt water; in such cases it is to be presumed that they who did cast such goods overboard do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make a due inquiry after them," which has been the law for 750 years and is still in full force and deserves attentive perusal. Independently of dereliction, the Admiralty Division will never decree more than a moiety of the value of the article saved for mere salvage: Gore *v.* Bethel, 1858, 12 Moo. P. C. C. 180; The Inca, 1858, 12 Moo. P. C. C. 189.

[3] 57 & 58 V. c. 60, §§ 502, 503, and § 633, infra; as to the construction of which, see The Rajah, 1872, L. R. 3 Ad. & Ecc. 539; and 63 & 64 V. c. 32, § 1.

[4] § 633 of 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894,") enacts, that "An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law." See Conserv. of Riv. Thames *v.* Hall, 1868, L. R. 3 C. P. 415; Prowse *v.* The European & Amer. St. Shipping Co., 1860, 13 Moo. P. C. C. 484; The Clan Gordon, 1882, 7 P. D. 190. This statutable law is applicable to a case where the collision has occurred within the limits of a foreign port: The Halley, 1868, L. R. 2 Ad. & Ecc. 3 (C. A.). As to the meaning of the word "compulsory," see Gen. St. Nav. Co.

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ship-owner must show not merely that he had a pilot on board at the time of the accident, and that the presence of such pilot was compulsory,[1] but also that the damage was occasioned exclusively by the pilot's fault.[2] It will, however, suffice for him in the first instance if he show that the pilot's fault occasioned the damage, leaving his opponent to establish, if he can, a case of contributory negligence against the ship-owner.[3]

§ 208A. It is a further presumption of Maritime Law that the legal owner of a ship is primâ facie liable to pay for all such repairs and stores ordered by the master,[4] as are necessary for the equipment and navigation of the ship in the voyage or trade in which she is employed, and that in the absence of all evidence to the contrary,[5] the master is the agent of the owner to give all needful orders, and has authority to pledge the owner's credit for goods supplied or work done in pursuance of his orders.[6]

v. Brit. & Col. St. Nav. Co., 1869, L. R. 3 Ex. 330, 4 Ex. 238. As to the meaning of the term "acting in charge," see The Princeton, 1878, 3 P. D. 90; The Guy Mannering, 1882, 7 P. D. 132 (C. A.). A pilot being on board a towed vessel will not exempt the tug from liability: The Mary, 1878, 5 P. D. 14; The Sinquasi, 1880, 5 P. D. 241. See, also, Spaight *v.* Tedcastle, 1881, 6 App. Cas. 217 (H. L.).

[1] The Earl of Auckland, 1861, 15 Moo. P. C. C. 304; S. C. nom. Malcomson *v.* Baldock, 1861, 30 L. J. P. M. & A. 121; The Hanna, 1866, L. R. 1 A. & E. 283; The Annapolis, 1861, 30 L. J. Adm. 201; The Lion, Owners *v.* The York Town, Owners, 1869, 38 L. J. Adm. 51.

[2] Hammond *v.* Rogers, 1850, 7 Moo. P. C. C. 160; Pollock *v.* M'Alpin, 1851, 7 Moo. P. C. C. 427; Bates *v.* Don Pablo Sora, 1856, 10 Moo. P. C. C. 467; The Carrier Dove, 1863, 2 Moo. P. C. C. (N.S.) 261; The Iona, 1867, L. R. 1 P. C. 426; The Minna, 1868, L. R. 2 A. & E. 97; The Velasquez, 1867, L. R. 1 P. C. 494; The Victoria, 1867, 37 L. J. Adm. 12; The General de Caen, 1855, Swabey, 9; The Mobile, 1856, Swa. Adm. 62, 127; The Admiral Boxer, 1857, Swabey, 193; The Schwalbe, 1861, 14 Moo. P. C. C. 241; The Netherlands St. Boat Co. *v.* Styles, 1854, 9 Moo. P. C. C. 286; The Protector, 1839, 1 W. Rob. Adm. 45; The Diana, 1840, 5 C. Rob. Adm. 60, P. C.; Rodriques *v.* Melhuish, 1854, 24 L. J. Ex. 26; Wood *v.* Smith, Re The City of Cambridge, 1874, L. R. 5 P. C. 451; Clyde Navig. Co. *v.* Barclay, 1876, 1 App. Cas. 790 (H. L.); The Meteor, 1875, Ir. R. 9 Eq. 567.

[3] Clyde Navig. Co. *v.* Barclay, 1876, 1 App. Cas. 790 (H. L.); The Daioz, 1878, 47 L. J. Adm. 1; The Marathon, 1879, 48 L. J. Adm. 17.

[4] As to the authority of a ship's husband to bind the owners, see Thomas *v.* Lewis, 1878, 4 Ex. D. 18.

[5] Mitcheson *v.* Oliver, 1855, 25 L. J. Q. B. 39; Hibbs *v.* Ross, 1866, L. R. 1 Q. B. 534; Gunn *v.* Roberts, 1874, L. R. 9 C. P. 331.

[6] Frost *v.* Oliver, 1853, 22 L. J. Q. B. 353; Beldon *v.* Campbell, 1851, 20 L. J. Ex. 324; The Great Eastern, 1868, L. R. 2 Adm. 88; Edwards *v.* Havell, 1853, 23 L. J. C. P. 7. See Wallace *v.* Fielden, 1851, 7 Moo. P. C. C. 398; Tronson *v.* Dent, 1853, 8 Moo. P. C. C. 419; Myers *v.* Willis, 1855, 39 L. J. C. P. 39, 255; Brodie *v.* Howard, 1856, 25 L. J. C. P. 57; Hackwood *v.* Lyall, 1855, 25 L. J. C. P. 44, n.; Mackenzie *v.* Pooley, 1856, 25 L. J.

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§ 209. § 209. In private International Law, legal presumptions are sometimes made with regard to domicil. The domicil of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom.[1] Where a man either has no fixed place of residence, or has two homes, the scale between which is almost evenly balanced, the presumption is primâ facie in favour of what is called the forum originis, or *domicil of origin;* by which is meant, not the place where he may chance to have been born, but *the home* of his parents.[2] Intention to adopt a place as his domicil may be presumed from a person's merely residing or merely marrying in a country—and à fortiori from both[3] in cases where the domicil of origin is not known;[4] though any presumption which would otherwise arise from the circumstances last mentioned may be rebutted by showing that the person whose domicil is in question merely came to live in the country for a limited period, or for a special purpose, or that he had no animus manendi, or settled intention of making that country his place of permanent abode.[5] It will also be presumed, where a married man has two houses situate in different countries, in each of which he is in the habit of residing, that his home or domicil is in that house in which his lawful wife and his establishment of servants usually remain when he is at the other.[6] In consequence of the legal presumption in favour of the domicil of origin,[7] slighter evidence is required

Ex. 124; Whitwell *v.* Perrin, 1858, 4 C. B. (N.S.) 412. See Atlantic Mut. Ins. Co. *v.* Huth, 1880, 16 Ch. D. 474.

[1] Craignish *v.* Hewitt, [1892] 3 Ch. 180 (C. A.).

[2] Munro *v.* Munro, 1840, 7 Cl. & Fin. 842 (H. L.); Bell *v.* Kennedy, 1868, L. R. 1 H. L. (Sc. & D.) 307; Somerville *v.* Somerville, 1801, 5 Ves. 750; Forbes *v.* Forbes, 1854, 23 L. J. Ch. 724; Crookenden *v.* Fuller, 1859, 29 L. J. P. & M. 1; Whicker *v.* Hume, 1859, 28 L. J. Ch. 396 (H. L.); Lord *v.* Colvin, 1859, 28 L. J. Ch. 361; Hodgson *v.* De Beauchesne, 1858, 12 Moo. P. C. C. 285, 317.

[3] In re Eschmann, infra.

[4] In re Eschmann, 1893, 9 Times L. R. 426; Bempde *v.* Johnstone, 1796, 3 Ves. 198; Bruce *v.* Bruce, 1790, 2 Bos. & P. 230, n.; The Diana, 1803, 5 C. Rob. Adm. 60; The Ocean, 1804, 5 C. Rob. Adm. 90; The President, 1804, 5 C. Rob. Adm. 227; Guier *v.* O'Daniel, 1806, 1 Binn. 349, n. (Am.).

[5] Bruce *v.* Bruce, 1790, 2 Bos. & P. 230, n.; Bell *v.* Kennedy, 1868, L. R. 1 H. L. (Sc. & D.) 307; Lord *v.* Colvin, 1859, 28 L. J. Ch. 361; Jopp *v.* Wood, 1865, 34 L. J. Ch. 211; King *v.* Foxwell, 1876, 3 Ch. D. 518; Gillis *v.* Gillis, 1874, Ir. R. 8 Eq. 597; The Harmony, 1800, 2 C. Rob. Adm. 322; Guier *v.* O'Daniel, 1806, 1 Binn. 349, n. (Am.).

[6] Forbes *v.* Forbes, 1854, 23 L. J. Ch. 724 (Wood, V.-C.); Platt *v.* Att.-Gen. of New S. Wales, 1878, 3 App. Cas. 336.

[7] See Udny *v.* Udny, 1869, L. R.

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to warrant the conclusion that a man has intended to abandon an acquired domicil, and to resume his domicil of origin, than is necessary to justify the conclusion that he has determined to abandon this last, and to acquire a new domicil.[1]

§ 210. There will, however, be a stronger presumption against the acquisition of a new domicil in the case of a person who is alleged to have gained one in a foreign land, than against the acquisition of one at a place where the party would not be a foreigner.[2] For instance, a Scotchman would be more readily decided to have acquired an English, or Anglo-Indian, domicil than a French one. This is because a man's acquisition of a foreign domicil is a most serious matter, since it not only renders the validity of his testamentary acts, and the disposition of his personal property, liable to be governed by foreign laws, but is calculated to involve him in a conflict of national duties, and to subject him to the embarrassments of a divided allegiance.[3] Further presumptions with regard to domicil are that it is by law presumed that the domicil of a wife is the domicil of her husband. Although, however, this presumption is, as a general rule, conclusive,[4] an exception might possibly be recognised in the case of a judicial separation pronounced by competent authority,[5] or where the husband had abjured the realm, deserted his wife, and established himself permanently in a foreign country, or had committed felony, and been transported.[6]

§ 211. It is a presumption of law with regard to copyhold property which is made in the absence of proof of any specific custom in the manor, first, that estates tail cannot be created, and next, that if they can, they are liable to be barred either by a common surrender, or by a surrender to the use of a will.[7]

1 H. L. (Sc.) 441; King *v.* Foxwell, 1876, 3 Ch. D. 518; Winans *v.* Att.-Gen., [1904] A. C. 287.

[1] Lord *v.* Colvin, 1859, 28 L. J. Ch. 361; Douglas *v.* Douglas, 1871, L. R. 12 Eq. 617.

[2] Id.; Whicker *v.* Hume, 1858, 28 L. J. Ch. 396 (H. L.); Hodgson *v.* De Beauchesne, 1858, 12 Moo. P. C. C. 285, 317; Crookenden *v.* Fuller, 1859, 29 L. J. P. & M. 1.

[3] Id. See also Westlake on Private International Law, 3rd ed., pp. 284 et seq.

[4] Dolphin *v.* Robins, 1859, 29 L. J. P. 11 (H. L.).

[5] Id. (Ld. Cranworth, Ld. Kingsdown).

[6] Id. (Ld. Cranworth).

[7] Goold *v.* White, 1854, Kay, 683; Radford *v.* Wilson, 1754, 3 Atk. 815; Moore *v.* Moore, 1755, 2 Ves. Sen. 596, 603.

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§§ 212—214.

§ 212. It is a primâ facie presumption of law with regard to peerages that where the limitation of a peerage cannot be discovered, it descends, not to the heirs general, but to the heirs male of the body of the original grantee.[1]

§ 213.[2] It is a presumption arising from the spirit of comity which is presumed to exist among nations, and a maxim of international law, that when the solution of any legal question depends upon the laws of a foreign State,—as, for example, when a contract made in one country is sought to be enforced in another,—courts of justice must, in the absence of any positive rule affirming or denying or restraining the operation of such foreign laws, presume that such foreign laws have been adopted by their own government, unless, indeed, they are repugnant to its policy, or prejudicial to its interest.[3]

§ 214.[4] PRESUMPTIONS OF FACT, it was pointed out, at the commencement of this chapter,[5] are the second of the two branches into which all presumptive evidence may be divided. Such presumptions are, in truth, mere arguments, of which the major premiss is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connexions, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while presumptions of law are reduced to fixed rules, and constitute a branch of the system of jurisprudence, presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of

[1] Glencairn Peer., 1796, 1 Macq. 444 (H. L.); recognised and confirmed in Montrose Peer., 1853, 1 Macq. 401 (H. L.); Herries' Peer., 1858, 3 Macq. 585; Breadalbane Peer., 1872, L. R. 2 H. L. (Sc). 269.

[2] Gr. Ev. § 43, in part.

[3] Bk. of Augusta *v.* Earle, 1839, 13 Pet. 519, 589, (Am.); Story, Confl. §§ 36—38; Huber, de Confl. Leg., lib. 1, tit. 2, § 2, p. 538.

[4] Gr. Ev. § 44, almost verbatim, except the note.

[5] Supra, § 70.

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the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered,[1] and the disputable presumption of fact that a person's life continues for a reasonable time after he has last been heard of.[2]

§ 215. These presumptions of fact remain the same under whatever law the legal effect of the facts, when found, is to be decided.[3] They embrace all the relations between the fact requiring proof and the fact or facts actually proved, whether such relations be direct or indirect, and whether they be physical or moral. A single circumstance may raise the inference, as well as a long chain of circumstances. For instance, the decision of King Solomon as to which of the two harlots was the mother of the living child, rested on the general presumption[4] in favour of maternal affection,[5] while the famous judgment of Sancho Panza acquitting the herdsman charged with rape,[6] was founded on the ascertained fact that the prosecutrix successfully resisted the attempt to take her purse, which the accused made by order of the court.

§ 216.[7] Although it is the exclusive province of the jury to fix the due weight which ought to be given to presumptions of fact,

[1] In Henry VI., Pt. ii., Act iii., Sc. 2, Warwick, after contemplating "duke Humphrey's timeless death," comments thus:—

"Who finds the heifer dead, and bleeding fresh,
And sees fast by a butcher with an axe,
But will suspect 'twas he that made the slaughter?"

See, also, Smollett's "Adventures of Roderick Random," Ch. xx.

[2] Connor, In the goods of, 1892, 29 L. R. Ir. 261.

[3] See 3 St. Ev. 932; 6 Law Mag. 370. This subject has been successfully illustrated in Wills, Cir. Ev. passim.

[4] Apart from this presumption, the sacred narrative contains not one word to show that, after all, the judgment was really in accordance with the fact.

[5] 1 Kings, ch. 3 vv. 16—28. Suetonius, in his life of the Emperor Claudian, ch. 16, states that that monarch discovered a woman to be the real mother of a young man, whom she refused to acknowledge, by commanding her to marry him; for rather than commit incest she confessed the truth. Diodorus Siculus also speaks of a King of Thrace, who discovered which of three claimants was the son of a deceased king of the Cimmerians, by ordering each of them to shoot an arrow into the dead body. Two obeyed without hesitation, but the other refused. See Bagster's Comprehensive Bible, note B. to v. 25 of ch. 3 of 1 Kings.

[6] "Sister of mine," said honest Sancho, to the damsel, "had you shown the same, or but half as much courage and resolution in defending your chastity, as you have shown in defending your money, the strength of Hercules could not have violated you." Don Quixote, part 2, book 3, ch 13.

[7] Gr. Ev. § 45, in part.

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§ 216. juries are usually aided in their labours by the advice and instruction of the judge, more or less strongly urged, at his discretion. Indeed, some few general propositions in regard to matters of fact, and the weight of testimony, are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the bench.[1] Such, for instance, is the caution usually given to juries, to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence, for though there is no rigid presumption of the common law against such testimony, experience has shown that it is little worthy of credit: and on this experience the usage is founded.[2] Other cases in which, though there is no actual rule of law on the subject, similar cautions should be given, are with regard to the *verbal admissions* of a party, (this kind of evidence being subject to much imperfection and mistake[3]), or to the effect that little reliance can be placed on the remainder of the evidence of a witness who has been detected in telling a falsehood in one part of his testimony.

[1] See New York Civ. Code, § 1852.

[2] See further as to the corroboration of accomplices, post, §§ 967—971.

[3] Oxford Spring Circuit, 1833, 5 C. & P. 542, n. (Parke, J.); R. v. Simons, 1834, 6 C. & P. 541; Williams *v.* Williams, 1798, 1 Hagg. Cons. 304. See post, §§ 861, 862.

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PART II.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.

CHAPTER I.

CORRESPONDENCE OF EVIDENCE WITH ALLEGATIONS; SUBSTANCE OF ISSUE; VARIANCE; AND AMENDMENT.

§§ 217—218.

§ 217.[1] THE production of evidence on a trial—whether civil or criminal—is governed by four general rules. *First*, the evidence must correspond with the allegations in the pleadings,[2] but the substance only of the issues raised thereby need be proved; *secondly*, the evidence must be confined to the points in issue; *thirdly*, the burthen of proving a proposition at issue lies on the party holding the substantial affirmative; and *fourthly*, the best evidence, of which the case in its nature is susceptible, must always be produced.

§ 218.[3] The first rule is that the evidence must correspond with the allegations in the pleadings. The pleadings, it may be explained, are the written allegations of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the issues.[2] If these are propositions of fact, the *first rule*, which it is important to remember, is, that the *evidence must correspond with the allegations, but that it is sufficient if the substance of the issues be proved.* Pleadings being intended[4] to apprise the parties of the specific questions to be tried, this object would be defeated if either party were at liberty to prove facts essentially different from those stated on the

[1] Gr. Ev. § 50, slightly.

[2] See generally as to the nature of pleadings, and the rules by which they are now governed, post, § 298 et seq.

[3] Gr. Ev. § 51, in part, as to first six lines.

[4] As to their objects, see further, post, § 299.

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§§ 218—221.

record, as constituting the claim or charge on the one hand, or the defence on the other.[1] Every material disagreement, between the allegation and the proof, constitutes what is called a *variance*, which, in strictness, is as fatal to the party on whom the proof lies as a total failure of evidence.

§ 219. Having regard to the recent changes in the law on this subject, it appears to be unnecessary to give detailed instances of what the old law held to be a variance.[2]

§ 220. A partial remedy for the injustice which in old days was done by the highly technical rules which prevailed as to "variances" was provided in 1828;[3] larger powers of amendment were granted in 1833 to the English judges,[4] and in 1840 to the Irish judges.[5]

§ 221. In *civil* cases further powers of amendment were created in 1852, by the Common Law Procedure Act,[6] and by the Equity Procedure Act of that year;[7] the Common Law Procedure Acts of 1854 and 1860 contained clauses authorising the amendment of "all defects and errors in any proceedings under the provisions" of those Acts respectively, "if duly applied for;"[8] while the Irish Common Law Procedure Act of 1853 empowered the judges in that country to amend "all defects and errors in any writ, pleading, record, or other

[1] In Caton *v.* Caton, 1849, 7 Notes of Cases, Ecc. & Mar. 28, Dr. Lushington observed: "The maxim of the Eccles. Courts, and I may say of all other courts, is to decide secundum allegata et probata. There must be both charge and evidence; the party cited is entitled to know the specific charge for the purpose of defence. . . . The difficulty I feel is to avoid the error of adhering to this rule with *pedantic strictness*, and, on the other hand, not to weaken a rule which is founded on one of the great principles of justice." See Malcolmson *v.* Clayton, 1860, 13 Moo. P. C. C. 198; The Ann, 1860, Lush. Adm. 55 (P. C.); Tyrer *v.* Henry, 1860, 14 Moo. P. C. C. 83; Kilgour *v.* Alexander, 1860, 14 Moo. P. C. C. 173; The Haswell, 1864, Brown & Lush. 247; and The Amalia, 1864, Brown & Lush. 311.

[2] Jones *v.* Cowley, 1825, 4 B. & C. 445, was declared by Alderson, B., to be "a great disgrace to the English law," in Hemming *v.* Parry, 1834, 6 C. & P. 580. See also Goodtitle *v.* Lammiman, 1809, 2 Camp. 274; Brooks *v.* Blanshard, 1833, 1 C. & M. 779.

[3] By 9 G. 4, c. 15 (repealed by 53 & 54 V. c. 33, "The S. L. R. Act, 1890").

[4] By 3 & 4 W. 4. c. 42, §§ 23, 24 (repealed as to High Court by 44 & 45 V. c. 59).

[5] By 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), §§ 48, 49.

[6] 15 & 16 V. c. 76, §§ 34, 35, 37. 222 (repealed by 46 & 47 V. c. 49). See corresponding sections in the Irish Act of 16 & 17 V. c. 113, §§ 85—91.

[7] 15 & 16 V. c. 86, §§ 49, 53.

[8] 17 & 18 V. c. 125, § 96; 23 & 24 V. c. 126, § 36. Repealed by 46 & 47 V. c. 49.

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proceeding in civil causes,"[1] and the law relating to such amendments was in *civil* cases further altered by the Rules of Court originally framed under the Judicature Acts of 1873 and 1875; and in 1883 these last-named Rules were annulled. The Rules, now regulating the amendment of proceedings in civil cases in the Supreme Court, are Orders XVI., XIX., and XXVIII. of the R. S. C., 1883.[2]

§§ 222–5. Not one of the above named three Orders, however, has any effect on *criminal* proceedings, or on proceedings for divorce or other matrimonial causes. Orders XVI. and XIX., moreover, are inoperative in proceedings, either on the Crown side, or on the Revenue side of the King's Bench Division. Order XXVIII. however, applies to all *civil* proceedings on the Crown side, including mandamus, prohibition, and quo warranto, and to all proceedings on the Revenue side, of the same Court.[3] And it will be recollected that the law as to amendment of civil proceedings in many inferior courts, is still governed by the enactments earlier than the Judicature Act which are referred to above.

§ 226. It would be out of place in a book of this character to enter into full details of the contents of the Rules just mentioned, or the practice under them. Briefly, however, their effect may be summarised by saying that, 1st, the court or a judge may at any stage of the proceedings, "for the purpose of determining the real questions in controversy between the parties,"[4] allow either party to alter or amend his indorsement or pleadings;[5] 2nd, without leave, the plaintiff may once, within the time allowed by the Rule, amend his statement of claim,

[1] 16 & 17 V. c. 113, § 231, Ir.

[2] Even an indorsement can be amended, see Cornish *v.* Hocking, 1853, 22 L. J. Q. B. 142; Leigh *v.* Baker, 1857, 26 L. J. C. P. 220. As to amendments of pleadings in the Consistory Court of London, see Reg. Gen. of 1877 relating to that court, Ord. III.

[3] Crown Office Rules, 1883, r. 299.

[4] As to what is "the real matter in controversy," it has been said that it is a matter, not of law, but of fact, what "the real question in controversy between the parties" is; next, that this matter of fact must be determined, not by the jury, but by the judge on a careful consideration of the pleadings and the evidence; and, lastly, that "the question in controversy" is, in other words, the question which both parties really intended to have tried, and not any question which, during the course of the trial, may for the first time be brought into controversy by one of the litigants. See Roles *v.* Davis, 1859, 28 L. J. Ex. 287 (judgment of Court of Common Pleas).

[5] Ord. XXVIII. r. 1.

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§§ 226—229. and the defendant his counterclaim or set-off;[1] 3rd, pleadings may be ordered to be amended by the striking out of scandalous or embarrassing matter,[2] or by the omission of any cause of action, where several have been united in the same action which cannot be conveniently disposed of together;[3] 4th, the court or judge may, at any stage of the proceedings, make such alterations in respect of the parties to the action as may enable the court effectually and completely to adjudicate upon and settle all the questions involved;[4] and lastly, any of these respective amendments may be allowed upon such terms as to costs or otherwise as may be just.[5]

§§ 227-9. It would, since this is not a book of Practice, not only be irrelevant to give details of the various decisions which have taken place as to amendments, but it would also be of no practical utility, seeing that it is extremely unlikely that a case in which the necessity for amendment arises at Nisi Prius will be identical, or nearly so, with any case which has been previously the subject of actual decision; moreover, the cases decided under the old law, even when they exemplify principles, would prove uncertain guides to the present practice, which aims

[1] Ord. XXVIII. rr. 2, 3. The costs of, and occasioned by, such amendment being borne by the party making the same unless the court or a judge shall otherwise order. Id. r. 13.

[2] Ord. XIX. r. 27.

[3] Ord. XVIII. r. 9.

[4] Ord. XVI. rr. 11, 12. An application to strike out, substitute, or add a party should be made on notice and not ex parte: Tildesley *v.* Harper, 1876, 3 Ch. D. 277 (Hall, V.-C.).

[5] An application to amend can only be made where there has been a bonâ fide mistake: Clowes *v.* Hilliard, 1876, 4 Ch. D. 413. But such mistake may be one of law: Duckett *v.* Gover, 1877, 6 Ch. D. 82. And the court must be satisfied, where a party is proposed to be added, that he has assented, or that his interests have been properly protected: Turquand *v.* Fearon, 1879, 4 Q. B. D. 280. Where, after an amendment, the opposite party fails to plead again, he is taken to rely on his original pleading: Boddy *v.* Wall, 1877, 7 Ch. D. 164. If a party be added (see r. 11 of Ord. XVI. as to this) he must, if he be a plaintiff, have given a written consent, and, if a defendant, be served with a summons or notice. As to when a plaintiff will or will not prejudice the fair trial of the action by asking alternative relief, see Bagot *v.* Easton, 1877, 7 Ch. D. 1 (C. A.). As to what is embarrassing, see Heap *v.* Marris, 1876, 2 Q. B. D. 630; Davy *v.* Garrett, 1877, 7 Ch. D. 473 (C. A.); Stokes *v.* Grant, 1878, 4 C. P. D. 25; Berdan *v.* Greenwood, 1887, 3 Ex. D. 251 (C. A.); Fleming *v.* Dollar, 1889, 23 Q. B. D. 388; Philips *v.* Philips, 1878, 4 Q. B. D. 127 (C. A.). This last case shows what statements must be contained in an action for the recovery of land of which the plaintiff has never been in possession. A county court judge can amend a misjoinder of defendants in an action remitted from the High Court. See Rennison *v.* Walker, 1872, L. R. 7 Ex. 143.

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at allowing all amendments which can be made without injustice to the parties, and which are necessary for determining the real question in controversy.[1]

§§ 230–1. Speaking generally, "there is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party,"[2] and this, "however negligent or careless may have been the first omission, and however late the proposed amendment. There is no injustice if the other side can be compensated by costs."[3] Leave to amend will, however, be refused when the amendment proposed cannot be made without prejudicing the opposite party in such a way that they cannot be recouped by costs; thus a defendant will not be allowed to amend his defence by alleging that a local authority, and not he, was liable, the period within which the local authority could have been sued having expired;[4] nor will a plaintiff be allowed to amend by setting up a fresh cause of action, which has become barred since the issue of the writ by the Statute of Limitations.[5]

§§ 232–9. It is only in the most exceptional circumstances that an amendment will be allowed for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance;[6] neither will an inconsistent or useless amendment be allowed;[7] and amendments which raise mere technical points

[1] In St. Losky *v.* Green, 1860, 9 C. B. (N.S.) 370, Byles, J., observed: "Various statutes have, from time to time, for more than 500 years, been passed, from the 14 Ed. 3, c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put upon them rendered them nearly abortive." For cases decided prior to the Jud. Acts on Amendments, see prior editions of this work; and those who wish to understand the *very old* doctrine of variance, and to trace its oppressive operation previously to the passing of the remedial statutes, will find the subject fully and ably treated in 1 St. Ev. 430—494. See, also, 1 Ph. Ev. 503 et seq. See, also, the cases cited supra, in n.[2] to § 219.

[2] Per Bowen, L.J., in Cropper *v.* Smith, 1884, 26 Ch. D. 710.

[3] Per Brett, M.R., in Clarapede *v.* Commercial Union Association, 1893, 32 W. R. 261; and see Weldon *v.* Neal, 1887, 19 Q. B. D. 394; Australian Steam Navigation Co. *v.* Smith, 1889, 14 App. Ca. 318.

[4] Steward *v.* North Metropolitan Tramways Co., 1886, 16 Q. B. D. 556; and see Edevain *v.* Cohen, 1889, 43 Ch. D. 187.

[5] Weldon *v.* Neal, 1887, supra; Lancaster *v.* Moss, 1899, 15 T. L. R. 476, C. A.

[6] Bentley *v.* Black, [1893] 9 T. L. R. 580 (C. A.), per Lord Esher, M.R.; Symonds *v.* City Bank, 1886, 34 W. R. 364.

[7] Sinclair *v.* James, [1894] 3 Ch. 557 (North, J.); Central Queensland Meat Co. *v.* Gallop, [1892] 8 T. L. R. 225; and see Wood *v.* Earl of Durham, 1888, 21 Q. B. D. 501.

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§§ 239—243.

are not encouraged.[1] An amendment will not in general be allowed where it is such as will change the action into one of a substantially different character;[2] but it will not necessarily be refused merely because it introduces a new cause of action.[3]

§§ 240–1. Amendments, as we have seen, may be allowed "at any stage of the proceedings;" therefore, not only will they be allowed in a proper case, at the hearing upon such terms as may be just, but even after verdict.[4] After final judgment, however, leave to amend cannot, or will not, be granted,[5] unless something still remains to be done in the case, as, for instance, as assessment of damages.[6]

§ 242. All disputed questions of amendment depend upon the discretion of the judge; the Court of Appeal[7] will, therefore, always be unwilling to interfere with that discretion, save in a case where it is obvious that some serious mischief would result from non-interference.[8]

§ 243. It is difficult to lay down any distinct rule as to the terms with regard to costs, and otherwise, upon which an amendment will be permitted. Each case must, in a great degree, depend upon its own particular circumstances. As a general proposition it may be said that the court will not allow any additional expense to be thrown upon the opposite party by reason of any amendment.[9] Thus, if the defendant has put a defence on the record, the proof of which will be rendered unnecessary by the plaintiff's amendment, or has summoned witnesses, whom it will thereby become needless to call, or has otherwise been at any bonâ fide expense in preparing to disprove the original allegations, the plaintiff will only be permitted to amend on payment of the costs occasioned by his error. If the defendant, in consequence of plaintiff's amendment, will require

[1] Collette *v.* Goode, 1877, 7 Ch. D. 842 (Fry, J.); and see Edevain *v.* Cohen, 1889, 43 Ch. D. 187 (C. A.).

[2] Raleigh *v.* Goschen, [1898] 1 Ch. 73 (Romer, J.); Halsey *v.* Brotherhood, 1881, 19 Ch. D. 386 (C. A.).

[3] Budding *v.* Murdoch, 1875, 1 Ch. D. 42.

[4] Wyatt *v.* Rosherville, &c. Co., 1886, 2 T. L. R. 282; The Dictator, [1892] P. 64; Knowlman *v.* Bluett, 1873, L. R. 9 Ex. 1.

[5] Durham *v.* Robertson, [1898] 1 Q. B. 765 (Chitty, L.J.); Att.-Gen. *v.* Birmingham Corporation, 1880, 15 Ch. D. 423.

[6] The Duke of Buccleuch, [1892] P. 201.

[7] See R. S. C. 1883, Ord. LVIII. r. 4, cited post, § 1883.

[8] Golding *v.* Wharton Salt Works Co., 1876, 1 Q. B. D. 374 (C. A.).

[9] Smith *v.* Brandram, 1841, 2 M. & Gr. 250.

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to alter his statement of defence, or to summon other witnesses, the trial will at least be postponed, and the plaintiff obliged to pay the costs of the postponement. In cases where a variance cannot have misled the opposite party, an amendment will be allowed without the payment of any costs.[1]

§ 244. Although the judge at Nisi Prius has a discretionary power of awarding or refusing costs in the event of an amendment, the court will take care that no injustice is done by his accidentally omitting to give directions on the subject. Therefore, when an order had been obtained by the plaintiff, enabling him to withdraw the record and amend his pleadings, but no mention was made as to costs, the court held that, as the variance had been corrected for the benefit of the plaintiff, he was bound, following the practice in such cases, to liquidate the defendant's costs of the day.[2]

§ 245. As already stated,[3] the present Rr. S. C., which have been referred to as to amendments, "apply to all civil proceedings on the Crown side of the King's Bench Division, including mandamus and prohibition, and also to quo warranto, and to all proceedings on the Revenue side of the said Division."[4] Such Rules further apply to the High Court exercising jurisdiction in Bankruptcy, which now forms part of the Supreme Court,[5] to Admiralty actions, and to Probate actions, and to such of the County Courts as have Bankruptcy jurisdiction.[6] But they do not affect the procedure or practice, either in criminal proceedings, or in proceedings for Divorce or other Matrimonial Causes.[7] In the Divorce Court the only material rule respecting the amendment of pleadings was promulgated in 1875, and is thus expressed:—"Either of the parties before the court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose."[8]

§ 246. Large powers of amendment are also possessed by the County Courts, when errors have been committed with respect

[1] St. Losky *v.* Green, 1860, 30 L. J. C. P. 191.
[2] Skinner *v.* London & Bright. Ry. Co., 1850, 5 Ex. 787.
[3] Ante, § 221.
[4] Ord. LXVIII. r. 2.
[5] 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 93.
[6] Ibid., § 100.
[7] Ord. LXVIII. r. 1.
[8] Rules in Div. and Mat. Causes, r. 187. See also rr. 35—37.

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§§ 246, 247.

to the names, descriptions, numbers or representative characters of the plaintiffs and defendants, or in the particulars of demand of a plaintiff, or in the notice or particulars of any special defence intended to be set up by a defendant;[1] and, in addition to these powers, it is provided[2] that a County Court judge "may at all times amend all defects and errors in any proceeding in the court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as the judge may think just; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made, if duly applied for." Still, if the particulars of the plaintiff's claim do not disclose a case within the jurisdiction of the County Court, the judge has no power to amend them, so as to turn the complaint into one over which he has cognisance.[3]

§ 247. The Civil Bill Courts in Ireland possess powers of amendment; for, by the Act regulating their practice,[4] "it shall and may be lawful for the several assistant barristers, and judges on appeal, and they are hereby respectively empowered, in all cases, to amend all variances between the statement of the cause of action in any civil bill, or other process or proceeding in their respective civil bill courts, and the evidence in support of such cause of action, and also to amend all variances, omissions, and misdescriptions in the descriptions, additions, and residence of the parties, or any of them, or otherwise howsoever, of or in any such process, or between the original and any copy or copies thereof, provided such last-mentioned variances, omissions, or misdescriptions shall not, in the opinion of the assistant barrister, be calculated to mislead the defendant or defendants therein; and in every case of any misjoinder of parties or causes of action, it shall and may be lawful for every assistant barrister to strike out of the process the name or names of any one or more

[1] See Cy. Ct. Rules, 1903, Ord. IV. r. 7, and Ord. XIV.

[2] By § 87 of "The County Courts Act, 1888" (51 & 52 V. c. 43).

[3] Hopper *v.* Warburton, 1862, 32 L. J. Q. B. 104 (Mellor, J., in B. Ct.).

[4] 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), § 106.

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plaintiffs or defendants, or any count or counts in such process, by reason of whom or which such misjoinder shall arise, and thereupon to proceed therein as to justice shall appertain."[1]

§ 247A. We have now indicated in a general way, and so far as they appear to be relevant to a work on Evidence, the principles which regulate amendments in *civil* cases. The subject of amendments in criminal cases remains for consideration.

§§ 248–51. We have seen that in 1828[2] some powers of amendment of variances in certain criminal cases were given,[3] these powers were exceedingly limited. Accordingly, in 1848, and the following year, the limited provisions of the Act of 1828 were greatly extended, and made applicable to *all offences* whatever.[4] In 1851, at the instance of Lord Campbell, an Act was passed,[5] which has placed criminal proceedings on nearly the same footing with civil actions, in respect to the amendment of variances between the record and the proof.[6]

[1] Further powers of amendment are given to the Civil Bill Cts., and to the "judge of assize on appeal," by 27 & 28 V. c. 99, § 48, Ir.

[2] By 9 G. 4, c. 15. See ante, § 220.

[3] See R. *v.* Cooke, 1836, 7 C. & P. 559; R. *v.* Hewins, 1841, 9 C. & P. 786; R. *v.* Christian, 1842, Car. & M. 388.

[4] By 11 & 12 V. c. 46, § 4, as to assize courts; and 12 & 13 V. c. 45 ("The Quarter Sessions Act, 1849"), as to sessions, the provisions of which Act are extended to *Irish* quarter sessions by 27 & 28 V. c. 99, § 49, Ir. The inferior courts in *Scotland* have now, under "The Summary Procedure Act, 1864" (27 & 28 V. c. 53), § 5, large powers of amending complaints before them with respect to variances and other defects.

[5] 14 & 15 V. c. 100 ("The Criminal Law Procedure Act, 1851").

[6] The principal provisions of this Act are as follows: § 1, "Whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name and description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the *name or description of any matter or thing whatsoever therein named or described*,—or in the ownership of any property named or described therein,—it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance *not material to the merits of the case*, and that the defendant *cannot be prejudiced thereby in his defence on such merits*, to order such

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§ 252. § 252. Under the provisions of the Act just referred to, an indictment charging the defendant with having obstructed a footway may be amended, when one of the termini of the way has been misdescribed, provided the variance be not calculated to prejudice the defence;[1]—an amendment may be made when the ownership of stolen property,[2] or the stolen property itself,[3] is wrongly described;—the misnomer of a party injured may be rectified;[4]—the misdescription of any persons described in the

indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued, as it may be necessary to amend, shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court. Provided always that, in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognisances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed;" and a further proviso directs, "that, where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges, as they were respectively entitled to before the first jury was sworn." By § 2, "Every verdict and judgment, which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made." By § 3, "if it shall become necessary at any time for any purpose whatsoever to draw up a formal record, in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made." See further as to amendment of formal defects in indictment, § 25 of the Act, post, § 280, n.[5].

[1] S. *v.* Sturge, 1854, 23 L. J. M. C. 172.

[2] R. *v.* Vincent, 1852, 21 L. J. M. C. 109; R. *v.* Fullarton, 1853, 6 Cox, C. C. 194.

[3] R. *v.* Gumble, 1872, L. R. 2 C. C. R. 1.

[4] R. *v.* Welton, 1862, 9 Cox, C. C. 297.

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indictment may be set right;[1]—an erroneous date ascribed to the passing of a statute may be struck out;[2]—an indictment for perjury alleging that the crime was committed on a trial for burning a *barn*, may (to meet the facts) be amended by alleging its commission on a charge of firing a *stack*.[3] It, moreover, is not too late to apply for an amendment, even though the counsel for the prisoner may have addressed the jury.[4]

§ 252A. In general, however, the court will not amend an indictment, after plea, if, in its amended form, it would be open to a demurrer.[5] Neither can an amendment be made after verdict.[6] Nor will the court amend an amendment, or restore an indictment, once amended, to its original form.[7] Where a prisoner was indicted for a statutable forgery, but the evidence only sustained a forgery at common law, an amendment on the indictment by striking out the word "feloniously" (thus converting a charge of felony into one of misdemeanor), has been refused.[8]

§ 253. The Acts which authorise amendments in criminal proceedings are founded on the policy that substantial justice is of more real importance than technical precision, and they accordingly seek to render punishment more certain, by neutralising the effect of trivial variances, which have constantly protected the wrongdoer. So long as the least rational doubt exists respecting his guilt, juries should weigh with jealousy the evidence against a prisoner; and judges should see most clearly that the act, with which he is charged, is an offence against the law. But when courts of justice go further than this, and permit the law to be defeated by technical errors, which cannot by possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, they take the most

[1] R. *v.* Western, 1868, L. R. 1 C. C. R. 122.

[2] R. *v.* Westley, 1859, 29 L. J. M. C. 35.

[3] R. *v.* Neville, 1852, 6 Cox, C. C. 69; R. *v.* Tymms, 1870, 11 Cox, C. C. 645.

[4] R. *v.* Fullarton, 1853, 6 Cox, C. C. 194 (Ir.); overruling R. *v.* Rymer, 1853, 2 Q. B. D. 136.

[5] R. *v.* Lallement, 1853, 6 Cox, C. C. 204. Sed qu. The case, as reported, is not satisfactory.

[6] R. *v.* Larkin, 1854, 23 L. J. M. C. 125; R. *v.* Frost, 1855, 24 L. J. M. C. 116.

[7] R. *v.* Barnes, 1866, L. R. 1 C. C. R. 45; R. *v.* Pritchard, 1867, 30 L. J. M. C. 169; R. *v.* Webster, 1861, 31 L. J. M. C. 17.

[8] R. *v.* Wright, 1860, 2 F. & F. 320.

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§§ 253—255. effectual means of rendering the administration of the criminal law a fitting subject for contempt and ridicule. In civil causes, the Rules authorising amendments receive a liberal construction. Why should an unduly strict construction be applied in criminal courts? The statutes themselves warrant no such distinction, and to introduce into the interpretation of them the old doctrine "strictissimi juris," is to misunderstand and misapply the meaning of that doctrine.

§ 254. Having drawn attention to the Rules and the Acts now authorising amendments, whether in civil or criminal proceedings, and the leading decisions upon their construction, some three or four *general* rules, which regulate the law of *variance*, may, with utility, be noticed; for although a discrepancy between the allegation and the proof is not (as formerly) fatal, if immaterial to the substantial merits, yet it may still entail considerable expense and responsibility as to costs on the party, who is driven by a "variance" to apply for an amendment. It is in view of this that the subject is still discussed in this work, and in applying the strict rules which exist as to variances, the ample power of amendment now possessed by the courts must not be forgotten. Subject to this observation, the rules with regard to variance may be stated to be *four* in number, and are as follow:—(1) *Surplusage need not be proved;* (2) *Cumulative allegations, or such as merely operate in aggravation, are immaterial;* (3) *Mere formal allegations need not be proved;* (4) *But allegations of matter of essential description must be proved as laid.* Having stated these four important rules, the remainder of this chapter will be devoted to discussing them in detail—

§ 255.[1] The first rule as to "variances" is, that *surplusage need not be proved, and that the proof, even if offered, should be rejected.* "Surplusage" comprehends whatever may be stricken from the record without destroying the right of action, or the charge, on the one hand, or the defence on the other. This, it is true, is a loose, and therefore unsatisfactory, definition; but it is difficult, if not impossible, to find one more distinct and practical. Each case must, in a great measure, depend on its own particular circumstances. The best general idea of what

[1] Gr. Ev. § 51, in part.

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will, or will not, amount to surplusage, is to be gained from one or two decisions on the point. Thus, where the pleading in an action for breach of a warranty that some claret was in a certain state alleged that it was not, and that *the defendant well knew* it was not in that state, but at the trial no evidence was given of the defendant's knowledge, after a verdict for the plaintiff, a motion having been made for a new trial, on the ground that the scienter, having been alleged, ought to have been proved, the court were unanimously of opinion that the allegation of the scienter was wholly unnecessary and immaterial, and therefore required no proof.[1] Said Lord Ellenborough: "If the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." Said Lawrence, J.: "I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover."[2]

§§ 256–7.[3] On the same principle, in an action for removing earth from the defendant's land, whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the

[1] Williamson *v.* Allison, 1802, 2 East, 446; cited by Ld. Abinger in Cornfoot *v.* Fowke, 1840, 9 L. J. Ex. 297.

[2] In Williamson *v.* Allison, 1802, 2 East, 446. See, also, Jackson *v.* Allaway, 1844, 13 L. J. C. P. 84; Att.-Gen. *v.* Clerc, 1844, 14 L. J. Ex. 82; Tempest *v.* Kilner, 1845, 15 L. J. C. P. 101; Anderson *v.* Thornton, 1853, 8 Ex. 425; Thom *v.* Bigland, 1853, 22 L. J. Ex. 243; Southall *v.* Rigg, and Forman *v.* Wright, 1851, 20 L. J. C. P. 145.

[3] Gr. Ev. § 64, as to first four lines.

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§§ 257—262.

defendant need not be proved, for the cause of action is perfect, independent of the intention;[1] in an action for impounding cattle in an unfit pound, an averment that the pound was "at all times unfit, as the defendant well knew," may be rejected as immaterial, and consequently it requires no proof;[2] if plaintiff's pleadings disclose a state of facts upon which an action may be maintained, although it may also (needlessly) allege malice or fraud, the plaintiff is not bound to prove either, and may recover upon the liability which the facts disclose, and this even if both fraud and malice be actually disproved;[3] in an action against a common carrier for the loss of property intrusted to him, negligence, though averred, need not be proved;[4] in trespass, for driving against the plaintiff's cart, an averment that he was in the cart is immaterial;[5] an averment that the defendant wrongfully cut in plaintiff's close, *used as a private road*, a certain large sewer, and thereby diverted the water from a pond, was held clearly immaterial, so far as regarded the words marked in italics, and the plaintiff entitled to recover damages, though it appeared that the sewer was cut previously to the construction of the road. "For," said Tindal, C.J., "what has it to do with the wrongful act of the defendant, or the measure of damages which the plaintiff is entitled to claim, whether the defendant used his close as a road, an orchard, or a garden?"[6]

§§ 258—262. In the former editions of this work many further examples of averments in pleading in civil cases which were "surplusage," and consequently "immaterial," were given, but having regard to the present liberal state of the law with regard to amendments, it is not thought advisable to weary the reader with any further examples of the application of the rule in civil cases.[7]

[1] Panton *v.* Holland, 1819, 17 Johns. 92 (Am.); Twiss *v.* Baldwin, 1832, 9 Conn. 291 (Am.).

[2] Bignell *v.* Clarke, 1860, 29 L. J. Ex. 257.

[3] Swinfen *v.* Ld. Chelmsford, 1860, 29 L. J. Ex. 382.

[4] Richards *v.* Lond. & South Coast Ry. Co., 1849, 18 L. J. C. P. 251. See ante, § 187.

[5] Howard *v.* Peete, 1817, 2 Chitty, R. 315.

[6] Dukes *v.* Gostling, 1835, 4 L. J. C. P. 211.

[7] Examples of the application of the old law are contained in Powell *v.* Bradbury, 1849, 18 L. J. C. P. 116 (see, however, Lush *v.* Russell, 1850, 19 L. J. Ex. 214, where this case is denied to be law); Smith *v.* Lovell, 1850, 20 L. J. C. P. 57; Horton *v.* M'Murtry, 1860, 29 L. J.

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§ 263. The law rejecting surplusage applies equally in criminal as in civil proceedings. The application of the rule that immaterial averments (or "surplusage") need not be proved in criminal cases may, moreover, be usefully exemplified. For instance, if a party be indicted for robbery *in the dwelling-house of A. B.*[1] or for arson *in the night time*,[2] the allegations marked in italics may be rejected as surplusage, and, consequently, need not be proved;[3] and where one section of a statute[4] (now repealed) said that a certificate *given knowingly* and wilfully, with intent to deceive, should be a misdemeanor, and a separate clause made it a distinct offence to give such a certificate *without having visited the patient*,[4] it was held that a conviction on an indictment, blending two distinct offences in one charge, and stating that defendant *knowingly, and with intention to deceive, signed the certificate without having visited the patient*, was, after a verdict in which the jury negatived any intent to deceive, but found the defendant guilty, held to have been rightly recorded, since, on the charge under the latter clause of the statute (viz., that of having certified without visiting), the averment of intention was mere surplusage.[5]

§ 264. On the same principle, too, where an indictment charged the defendants with conspiring to indict the prosecutor *falsely*, with intent to extort money, they were held to be rightly convicted, though the jury, in finding them guilty of conspiring to indict with the intent alleged, expressly negatived any conspiracy to make a false charge; for the court observed that a conspiracy to prefer an indictment for purposes of extortion was doubtless a misdemeanor, whether the charge were true or false.[6] Again, where a parish was indicted for non-repair of a

Ex. 265; Keller *v.* Blood, 1861, 13 Ir. C. L. R. 19; R. *v.* M'Kenna, 1842, Ir. Cir. R. 416; R. *v.* Durore, 1784, 1 Lea. 351; and R. *v.* Upton-on-Severn, 1833, 6 C. & P. 133.

[1] R. *v.* Pye, 1790, 2 East, P. C. 785; R. *v.* Johnstone, 1793, 2 East, P. C. 786 (by all the judges); see, also, R. *v.* Wardle, 1800, R. & R. 9.

[2] R. *v.* Minton, 1786, 2 East, P. C. 1021.

[3] For other instances, see R. *v.* Phillips, 1818, R. & R. 369; R. *v.* Oxford, 1819, R. & R. 382; R. *v.* Summers, 1705, 2 East, P. C. 785; R. *v.* Hickman, 1784, 2 East, P. C. 593; R. *v.* Radley, 1849, 18 L. J. M. C. 184; R. *v.* Otway, 1849, Ir. C. L. R. 69; R. *v.* Williams, 1850, 2 Den. 61; R. *v.* Kealey, 1851, 20 L. J. M. C. 57; R. *v.* Healey, 1824, 1 Moody, C. C. 1.

[4] 9 G. 4, c. 41, §§ 9, 29, and 30.

[5] R. *v.* Jones, 1831, 3 B. & Ad. 611.

[6] R. *v.* Hollingberry, 1825, 4 B. & C. 329.

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§§ 264—266. highway, an allegation that the road in question was an immemorial highway has been rejected as surplusage;[1] on an indictment for *jointly* receiving stolen property, persons guilty of separately receiving any part of such property may by statute be convicted;[2] and on an indictment charging a common law offence as having been committed "against the form of the statute," the allegation in question may be rejected as surplusage.[3]

§ 265. The second rule[4] respecting variances is, that *cumulative allegations, or such as merely operate in aggravation, are immaterial, provided that sufficient is proved to establish some right, offence, or justification, included in the claim, charge, or defence specified on the record.*[5] For example, where a defendant was charged in an information with *composing*, printing, and publishing a libel, but no evidence having been given to show that he was the *author*, his counsel having claimed an acquittal, Lord Ellenborough[6] observed, "It is enough to prove publication. If an indictment charges that the defendant *did and caused to be done*[7] a particular act, it is enough to prove either. This distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." This is subject to the qualification that both offences must be felonies or both misdemeanors, for felony and misdemeanor are different things, and upon an indictment for the one there can be no conviction for the other, except under the express provision of some statute.[8] On an indictment for publishing a defamatory libel, 'knowing the same to be false,' the defendant may be convicted of publishing a defamatory libel.[9]

§ 266. Accordingly at common law, on an indictment for

[1] R. *v.* Turweston, 1850, 20 L. J. M. C. 46.
[2] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 94.
[3] R. *v.* Mathews, 1793, 5 T. R. 162. See, also, 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 24, cited post, § 280, n. [8].
[4] Supra, § 254.
[5] R. *v.* Macpherson, 1869, 26 L. J. M. C. 134.
[6] See R. *v.* Hunt, 1811, 2 Camp. 583; S. P. in R. *v.* Williams, 1811, 2 Camp. 646.
[7] S. P. in R. *v.* Middlehurst, 1757, 1 Burr. 400.
[8] R. *v.* Thomas, 1875, L. R. 2 C. C. R. 141.
[9] Boaler *v.* The Queen, 1888, 21 Q. B. D. 284.

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murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation;[1] on an indictment for treason or conspiracy charging several overt acts, it is sufficient to prove one;[2] and on an indictment for obtaining property by several false pretences, it is not necessary to prove them all, unless they are so connected as to be incapable of separation,[3] but it will suffice to prove the one or more, by which the property was in fact obtained.[4] On an indictment for burglary, if the prosecutor establish his case, with the exception of proving the breaking was at night, the prisoner may be convicted of housebreaking. If no breaking be proved, but the property stolen be laid in the indictment, and be proved by the evidence to be of the value of 5*l.*, the prisoner may be convicted of stealing in a dwelling-house to that amount,[5] or if there be no evidence of the value being 5*l.*, the prisoner may be convicted of simple larceny;[6] and the same principle applies on a charge of stealing in a dwelling-house with menaces, or of stealing from the person with or without violence, or of stealing as a servant.[7] Upon a count for malicious wounding or for maliciously inflicting grievous bodily harm, the prisoner may be convicted of a common assault.[8]

§ 267. Moreover, if a compound intent, or several intents, be laid in the indictment, and if one part of the compound intent, or each of the several intents, when coupled with the act done, constitute an offence, it will not be necessary to prove the whole as laid. For example, an indictment for killing a sheep, with intent to steal the whole carcase, will be supported by proof of an intent to steal part of the carcase;[9] if a prisoner be charged

[1] Co. Lit. 282 *a*.

[2] Fost. 194.

[3] R. *v.* Wickham, 1839, 10 A. & E. 34.

[4] R. *v.* Hill, 1811, R. & R. 190; R. *v.* Lince, 1873, 12 Cox, C. C. 451.

[5] See R. *v.* Compton, 1828, 3 C. & P. 418.

[6] 2 Hale, 302.

[7] East, P. C. 784; R. *v.* Bullock, 1825, 1 Moody, C. C. 324; R. *v.* Jackson, 1842, cited 3 Russell on Crimes, 404.

[8] R. *v.* Jennings, 1858, 7 Cox, C. C. 397; R. *v.* Taylor, 1868, L. R. 1 C. C. 194; R. *v.* Canwell, 1869, 11 Cox, C. C. 263; R. *v.* Oliver, 1860, 8 Cox, C. C. 384; R. *v.* Yeadon, 1861, L. & C. 81; R. *v.* Guthrie, 1870, L. R. 1 C. C. 241.

[9] R. *v.* Williams, 1825, 1 Moody, C. C. 107. The same point seems to have been ruled by Cresswell, J., in R. *v.* Marley, 1842, cited 2 Russ. C. & M. 289. The principle in both cases was "that the offence of intending to steal a part was part of the offence of intending to steal the

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§§ 267—270. with obtaining an order for a certain sum from the prosecutor with intent to defraud him of the *same*, he may be legally convicted, though it appears that his real intention was to cheat the prosecutor out of a small portion only of the proceeds of the order;[1] under the old law a man accused of assaulting a girl with attempt to abuse her and carnally know her, might be found guilty of an assault with intent to abuse simply;[2] and a party indicted for publishing a libel with intent to defame certain magistrates, and also to bring the administration of justice into contempt, may be found guilty, if the libel was published with *either* of those intents.[3]

§ 268. But the intent proved must either correspond with, or be included in, the intent alleged. Thus, it will be a fatal variance if an indictment for burglary charge an intent to steal, and it be shown that the real intent was to commit rape or murder;[4] and a prisoner charged with burglary and stealing will be acquitted, if no property was taken, though it appear that the house was entered with an intent to steal; and though, had larceny actually been committed, he would have been convicted without any allegation in the indictment of a felonious intent.[5]

§§ 269–70. The rule that matters merely of aggravation may be treated as surplusage and consequently immaterial, provided enough be proved to establish some substantial offence included in the proceeding upon the record has been adopted by statute,[6] and extended in some instances to enable a conviction for a misdemeanor to take place upon an indictment for felony. A woman charged with the murder of her infant may be convicted of endeavouring to conceal its birth;[7] a person indicted for felony in administering poison so as to endanger life, or to inflict grievous bodily harm, may be convicted of the misdemeanor of administering poison with intent to injure, aggrieve, or annoy

whole, and that the statute meant to make it immaterial whether the intent applied to the whole, or only to part."

[1] R. *v.* Leonard, 1848, 1 Den. 304.

[2] R. *v.* Dawson, 1821, 3 Stark. R. 62.

[3] R. *v.* Evans, 1821, 3 Stark. R. 35.

[4] 2 East, P. C. 514.

[5] R. *v.* Furnival, 1821, R. & R. 445: R. *v.* Vandercomb, 1796, 2 Lea. 708.

[6] See 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 41, enabling upon the trial of any person for robbery a conviction to ensue of assault with intent to rob.

[7] 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 60.

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§§ 269, 270.

some one;[1] upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege the defendant did cut, wound, or stab any person, if the jury be satisfied that the defendant is guilty of the cutting, wounding, or stabbing, but under such circumstances as to make the offence a felony, the jury may convict of the misdemeanor of unlawful wounding;[2] and it is provided[3] that, "if, on the trial of any person charged with any felony or misdemeanor,[4] it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person, so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." [5]

[1] Id. § 25.

[2] 14 & 15 V. c. 19, § 5.

[3] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 9, replacing 7 W. 4 & 1 V. c. 85, § 11 (which was worded differently, and is repealed by 14 & 15 V. c. 100, § 10); as to the construction of which, see R. *v.* Bird, 1851, 20 L. J. M. C. 70. See R. *v.* M'Pherson, 1857, 26 L. J. M. C. 134.

[4] See R. *v.* Ryland, 1868, 11 Cox, C. C. 101; R. *v.* Hapgood and Wyatt, 1870, 11 Cox, C. C. 471.

[5] The Articles of War for the government of the Navy establish rules similar to those recognised by canon and statute law. "The Naval Discipline Act, 1866" (29 & 30 V. c. 109), expressly enacts, indeed, in § 48, that "where any prisoner shall be charged with murder, a court-martial may find him guilty of manslaughter, or of a common assault; where he shall be charged with sodomy, a court-martial may find him guilty of an indecent assault; where he shall be charged with theft, a court-martial may find him guilty of an attempt to thieve, or of embezzlement, or of wrongful appropriation of property belonging to another; and, generally, where any prisoner shall be charged with any offence under this Act, he may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment."

"The Army Act, 1881" (44 & 45 V. c. 58), in § 56 thereof, also contains provisions to the same effect, and enacting that any prisoner charged before a court-martial with stealing may be found guilty of embezzlement, or of fraudulently misapplying money or property; and if he be charged with embezzlement may be convicted of stealing, or of fraudulent misapplication; and if he be charged with desertion may be

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§§ 271—280.

§§ 271-7. The rule that mere "*cumulate allegations*," or "averments in aggravation," need not be proved not only prevails in criminal cases, but equally obtains in civil actions. For instance, in an action for defamation, if the plaintiff allege special damage, he need not prove it, provided the words be actionable *per se*, although, of course, he will not recover the special damage which he does not prove;[1] in an action on a policy of insurance, the material allegation is the loss; but whether total or partial, is a mere question of degree; and if the former be alleged, proof of the latter is sufficient.[2] In all cases, indeed, a party may in his statement of claim sue for a less right than he is able to prove, provided that the lesser right claimed does not differ in kind from, but is included in, the greater right proved.[3]

§§ 278-9. The third rule[4] with regard to variances is that mere *formal allegations* need not be proved. "Formal allegations" comprise,—among other matters,—all those averments of *place*, *time*, *number*, *value*, *quality*, and the like, which may be inserted in the pleadings, without being either essentially descriptive of the subject of the claim or charge, or otherwise rendered material by special circumstances, and also a multitude of other idle statements, which, in former times, English lawyers loved to introduce into every legal document. Since the modern amendments in the law, the rule in question has fortunately become a matter more of historical curiosity than of present practical interest.

§ 280. Indeed, so far as civil actions are concerned, this rule has passed into a dead letter; and Lord Campbell's Act of 1851[5]

found guilty of attempting to desert, or of being abroad without leave; and if he be charged with attempting to desert may be found guilty of desertion or of illegal absence. The section then concludes with a general, but not very happily expressed, enactment, that "a prisoner charged before a court-martial with any other offence under this Act may, on failure of proof of an offence being committed under circumstances involving a higher degree of punishment, be found guilty of the *same* offence as being committed under circumstances involving a less degree of punishment."

[1] Smith *v.* Thomas, 1835, 2 Bing. N. C. 380.

[2] Gardner *v.* Croasdale, 1760, 2 Burr. 904; Benson *v.* Chapman, 1848, 2 H. L. C. 696; King *v.* Walker, 1863, 33 L. J. Ex. 167.

[3] Duncan *v.* Louch, 1845, 14 L. J. Q. B. 185; Bailey *v.* Appleyard, 1838, 8 A. & E. 161.

[4] Supra, § 254.

[5] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 23, enacting, that "it shall not be necessary

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renders it of little importance even in criminal cases. With regard to averments of *place*, it is now sufficient in all cases, *excepting where local description is required*, to state in the margin of the indictment the county, city, or other jurisdiction, as the venue for all the facts averred in the body of the indictment.[1]

§ 281. In indictments, however, for those offences which the law regards as bearing a *local character*, the proof respecting the place must still correspond with the allegation; though probably in many cases of variance on this point the courts would sanction

to state any *venue* in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county or any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue." § 24 enacts, that "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of 'against the form of the statutes,' or vice versâ, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in *any case where time is not of the essence of the offence*, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence." § 25 enacts, that "every objection to any indictment for any *formal defect* apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court, before which any such objection shall be taken for the formal defect, may, if it be thought necessary, cause the indictment to be forthwith *amended* in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

[1] As to the former law, see R. *v.* Hollond, 1794, 5 T. R. 607; R. *v.* Haynes, 1815, 4 M. & Selw. 214; R. *v.* Feargus O'Connor, 1843, 5 Q. B. 16; 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 20. Even before the Act it was no objection in the case of a transitory felony that there was no such parish in the county as that in which the offence was stated to have been committed: R. *v.* Woodward, 1831, 1 Moody, C. C. 323; R. *v.* Dowling, 1826, Ry. & M. 433.

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§§ 281, 282.

an amendment of the record.[1] The distinction between local and transitory offences is not very clearly drawn. The test of a local offence would seem to be, Was it committed under circumstances which render it particularly necessary to give the accused notice of the exact offence he has to meet, or to enable him subsequently to plead "autrefois acquit," or "convict"? Among *local* offences are—among others—burglary,[2] but not highway robbery;[3] housebreaking;[4] stealing in a dwelling-house;[5] sacrilege;[6] riotously demolishing churches, houses, machinery, &c.;[7] maliciously firing a dwelling-house, perhaps an out-house, but not a stack;[8] forcible entry;[9] poaching;[10] nuisances to highways;[11] and malicious injuries to sea-banks, mill-dams, or other local property. In most of these cases it is sufficient to allege and prove the parish, township, or other local district, less than a county, in which the offence was committed;[12] but in some, a more accurate description is necessary.

§ 282. For example, an indictment for not repairing a highway must specify the situation of the road within the parish, and any substantial variance between the description and the evidence will be material;[13] on an indictment for night poaching, it has been held, by a majority of the judges, that the locus in quo must be described either by name, ownership, occupation, or abuttals, and that it is not sufficient to allege that the prisoner was found "in a certain close in the parish of A;"[14] but on a charge

[1] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 1, cited ante, § 249.

[2] 1 Russ. C. & M. 826; R. *v.* St. John, 1839, 9 C. & P. 40.

[3] R. *v.* Dowling, 1826, Ry. & M. 433.

[4] R. *v.* Bullock, 1825, 1 Moody, C. C. 324, n.

[5] R. *v.* Napper, 1824, 1 Moody, C. C. 44; R. *v.* Jarrald, 1863, 32 L. J. M. C. 258.

[6] Arch. Cr. Pl. 57, and p. 457 of 21st edit. (1893).

[7] R. *v.* Richards, 1832, 1 M. & Rob. 177.

[8] R. *v.* Woodward, 1831, 1 Moody, C. C. 323.

[9] 2 Leon. 186.

[10] R. *v.* Ridley, 1823, R. & R. 515.

[11] R. *v.* Steventon, 1843, 1 C. & K. 55.

[12] See R. *v.* Napper, 1824, 1 Moody, C. C. 44.

[13] R. *v.* Great Canfield, 1810, 6 Esp. 136; R. *v.* Upton-on-Severn, 1833, 6 C. & P. 133; R. *v.* Steventon, 1843, 1 C. & K. 55. See R. *v.* March. Dow. of Downshire, 1835, 4 A. & E. 232; R. *v.* Waverton, 1851, 21 L. J. M. C. 7. If a carriage-way is described as a bridle-way, the variance is material: R. *v.* St. Weonard's, 1834, 6 C. & P. 582. See, also, R. *v.* Lyon, 1824, Ry. & M. 151.

[14] R. *v.* Ridley, 1823, R. & R. 515, under the repealed Act of 57 G. 3, c. 90, § 1; R. *v.* Crick, 1832, 5 C. & P. 508, under 9 G. 4, c. 69 ("The Night Poaching Act, 1828"), § 9. In R. *v.* Owen, 1826, 1 Moody, C. C. 118, where the close was de-

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of taking or destroying fish in water adjoining a dwelling-house, if the boundary of any parish, township, or vill, happen to be in or by the side of such water, it is by statute sufficient to prove that the offence was committed either in the parish, township, or vill, named in the indictment, or in any such local district adjoining the water;[1] and if the charge be that of stealing oysters, or oyster brood, the bed, laying, or fishery may also by statute be described by name or otherwise, without stating it to be in any particular parish, township, or vill.[2] Moreover, an indictment for an *affray* cannot be sustained, unless it contain an averment that the offence was committed in a public street or highway, and unless that averment be supported by corresponding proof.[3]

§§ 283–4. Excepting in the very few cases where *time is of the essence of the offence*, an indictment,[4] too, need not contain any allegation respecting time.[5]

§ 285. Allegations of *number* and *value* are, also, in general immaterial in indictments. Thus, if a party be charged with stealing five horses, he may be convicted of stealing one; and if he be indicted for larceny or robbery, and the property be laid as of the value of twenty shillings, the offence will be complete, though it appear that the article stolen was of less value than

scribed by name and occupation, but the name proved was different from that alleged, the judges held that the variance was fatal. See R. *v.* Andrews, 1837, 2 M. & Rob. 37, and R. *v.* Eaton, 1851, 2 Den. C. C. 274.

[1] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 24.

[2] Id. § 26.

[3] R. *v.* O'Neill, 1871, Ir. R. 6 C. L. 1.

[4] So as to coroners' inquisitions; see "The Coroners Act, 1887" (50 & 51 V. c. 71), § 20; and see, also, R. *v.* Ingham, 1864, 33 L. J. Q. B. 183.

[5] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851") § 24, cited ante, § 280, n. [5], on p. 226. The old rule required a day to be specified, but did not require that day to be proved. But the legislature has now adopted my Uncle Toby's reply to Corporal Trim's argument in telling his unfortunate story of the King of Bohemia. "'There was a certain King of Bohemia, but in what year of our Lord,'—'I would not give a halfpenny to know,' said my Uncle Toby. '*Only, an' please your Honour, it makes a story look the better in the face.*' '*Leave out the date entirely, Trim,*' said my Uncle; '*a story passes very well without these niceties, unless one is pretty sure of 'em!*'" Even before the statute, where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, when the jury had expressly found that this was not correct. See, also, R. *v.* Treharne, 1831, 1 Moody, C. C. 298; and R. *v.* Levy, 1819, 2 Stark. R. 458.

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§§ 285—287. any coin of the realm, provided that it was of *some* value to the owner.[1]

§ 286. In certain cases, however, value is essential to constitute the offence; as where a bankrupt is indicted for fraudulently concealing or removing property to the value of ten pounds,[2] or for absconding with property to the amount of twenty pounds,[3] or a person is indicted for maliciously injuring property to an amount exceeding five pounds,[4] or a tenant is indicted for stealing a chattel or fixture let to him with his house or lodgings, and exceeding the value of five pounds,[5] or a party is charged with stealing in a dwelling-house chattels, &c., to that amount,[6] or with stealing, or with destroying or damaging, either maliciously or with intent to steal, any trees in a park, pleasure-ground, garden, or orchard, above the value of one pound, or any trees elsewhere above the value of five pounds.[7] In such cases as these, the evidence must so far correspond with the allegation as to show that the statutable offence has been committed: that is, the property fraudulently or maliciously dealt with, stolen, or destroyed, must be proved, as well as alleged, to be of the requisite value; though if this be done, the exact amount specified in the indictment need not be proved.

§ 287. *Descriptions* of the subject-matter of the offence are also, in many cases, unnecessary. Thus in an indictment for embezzlement against a clerk or servant, or against a person employed

[1] R. *v.* Morris, 1840, 9 C. & P. 347; R. *v.* Bingley, 1833, 5 C. & P. 602; R. *v.* Clark, 1810, R. & R. 181. The fact of the article being in the possession of the prosecutor is, in general, evidence that it was of value to him. Id.

[2] 32 & 33 V. c. 62 ("The Debtors Act, 1869"), § 11, sub-sects. 4, 5; as amended by 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 163, and 53 & 54 V. c. 71 ("The Bankruptcy Act, 1890"), § 26; 35 & 36 V. c. 57, § 11, sub-sects. 4, 5, Ir.

[3] 32 & 33 V. c. 62, § 12; as amended by 46 & 47 V. c. 52, § 163; 35 & 36 V. c. 57, § 12, Ir.

[4] 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 51. The damage must be done at one time: R. *v.* Williams, 1862, 9 Cox, C. C. 338, Ir. The value of each article injured need not be stated, but it will be sufficient to allege that the amount of the aggregate damage exceeded 5*l.*: R. *v.* Thoman, 1871, 12 Cox, C. C. 54.

[5] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 74. If the value of the property stolen do not exceed 5*l.*, the prisoner is not liable to penal servitude. Id.

[6] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 60.

[7] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 32; 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), §§ 20, 21. Where several trees have been stolen or damaged at the same time, their collective value will satisfy the Act: R. *v.* Shepherd, 1868, L. R. 1 C. C. R. 118.

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§§ 287, 288.

either in Her Majesty's public service, or in the police, if the offence relate to any money or valuable security, it is sufficient to allege that money was embezzled, without specifying any particular coin or valuable security; and such allegation may be supported by equally loose evidence;[1] and it seems, even by proof of a general deficiency of money that ought to be forthcoming, without showing from what persons the money was received, or of what coins it consisted, or that any particular sum was received, and not accounted for by the prisoner.[2] So, also, "in any indictment in which it shall be necessary to make any averment as to any money,[3] or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the banknote, shall not be proved; and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly."[4]

§ 288. Allegations of *quality* (or, in other words, those allegations which describe the mode in which certain acts have been done) may often be omitted from an indictment, and it is seldom necessary to prove them with precision. For example, in an indictment[5] for murder or manslaughter, it is unnecessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it is sufficient to charge that the defendant did feloniously, wilfully, and of his malice

[1] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 71.

[2] R. *v.* Grove, 1833, 7 C. & P. 635 (eight judges including the three chiefs against seven).

[3] See R. *v.* Gumble, 1872, L. R. 2 C. C. R. 1.

[4] 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 18.

[5] This term includes inquisitions taken before coroners: R. *v.* Ingham, 1864, 33 L. J. Q. B. 183.

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aforethought kill and murder the deceased, or, in an indictment for manslaughter, that he did feloniously kill and slay him.[1] Moreover, should an indictment for homicide unnecessarily allege the means of death, it would be quite sufficient for the proof to agree with the allegation in its general character, without precise conformity in every particular. Similarly, on a charge of felonious assault, if it be alleged that it was committed with a staff, and the proof be that it was done with a stone; or if a wound, alleged to have been given with a sword, be proved to have been inflicted by an axe; or if a pistol be stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material,[2] the charge is substantially proved, and no variance occurs.[3]

§ 289. The fourth general and remaining rule[4] as to variances is that *allegations of matter of essential description must be proved as laid.* The only practical mode of understanding this rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases, always bearing in mind that the judges now have large powers of granting amendments both in civil and in criminal proceedings.[5] And first, with respect to the criminal law, it is now clearly established, that the *name or nature of the property* stolen or damaged is *matter of essential description.* For example, the variance is fatal if, on a charge of firing a stack of hay, it turns out to have been a stack of wheat; or if a man be accused of stealing a drake, and it is proved to have been a goose, or even a duck, unless, indeed, an amendment be permitted.[6] An instance of the application of this rule, before amendments were as liberally allowed as now, occurred some years ago at assizes. A man, charged with stealing "a slop," the theft

[1] 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 6.

[2] R. *v.* Oxford, 1840, 9 C. & P. 525. See R. *v.* Hughes, 1832, 5 C. & P. 126, the marginal note of which is misleading.

[3] 1 East, P. C. 341; R. *v.* Martin, 1832, 5 C. & P. 128. See, further, as to the law prior to the passing of Ld. Campbell's Act in 1851, R. *v.* M'Conkey, 1841, Ir. Cir. R. 77; R. *v.* Waters, 1832, 7 C. & P. 250; R. *v.* Culkin, 1832, 5 C. & P. 121; R. *v.* Thompson, 1826, 1 Moody, C. C. 139, R. *v.* Kelly, 1825; R. *v.* Mosley, 1825, 1 Moody, C. C. 97; R. *v.* Tomlinson, 1834, 6 C. & P. 370; R. *v.* Turner, 1830, 1 Lew. C. C. 177; R. *v.* Warman, 1846, 1 Den. 183.

[4] Supra, § 254.

[5] See ante, §§ 220—225, 249.

[6] Under § 1 of 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), cited ante, § 249.

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of which was clearly proved, when called upon for his defence, exclaimed, "Why, my lord, it ain't no slop." "You hear what he says," observed the judge to the jury. "Is it a slop, gentlemen?" "No, my lord, it's a smock," said they. "Then you must acquit the prisoner." He was acquitted; but the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing "a smock." Nothing daunted, the prisoner now pleaded autrefois acquit, and called several witnesses to prove that the article he had stolen was in fact a slop, and this question was submitted to a second jury with much gravity by the learned judge.[1]

§ 290. Where the stealing of specified animals is made a statutable offence, it seems sufficient to use the generic term which includes the whole species, even though the language of the Act should be more specific. Thus, on an indictment for sheep stealing, framed under an Act[2] making it penal to steal any "ram, ewe, sheep, or lamb," charging a man with killing a sheep, with intent to steal the carcase, it having been proved that a sheep was killed, but the sex could not be discovered, a great majority of the judges held that "sheep" was a generic term, which included equally rams, ewes, and wethers, and confirmed the conviction;[3] an indictment for stealing a sheep will now be supported by evidence of killing a lamb;[4] a charge of stealing a horse would be sustained by proof of stealing a gelding, a mare, a colt, filly.[5]

[1] 29 Law Mag. 12, 13.

[2] 7 & 8 G. 4, c. 29, § 25 (now repealed). The same words are now contained in 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 10.

[3] R. *v.* M'Culley, 1838, 2 Moody, C. C. 34; R. *v.* Bannam, 1839, 1 Crawf. & D. C. C. 117 (Ir.). These cases overrule R. *v.* Puddifoot, 1829, 1 Moody, C. C. 247.

[4] R. *v.* Spicer, 1845, 1 C. & K. 699, overruling R. *v.* Loom, 1827, 1 Moody, C. C. 160. The decision in R. *v.* Loom was under the repealed Act of 15 G. 2, c. 34, which, like the Act of 7 & 8 G. 4, c. 29, § 25, specified lambs as well as sheep. In an old Act of 25 H. 8, c. 13, §§ 2, 13, which is now repealed by 19 & 20 V. c. 64; and which prohibited persons from having above 2,000 sheep, it was expressly enacted, that "lambs under the age of one whole year shall not be adjudged for sheep prohibited by the statute." The special insertion of such a clause leads rather to an inference, that, without it, the mention of the grown animal would have included the young. See next note.

[5] "Horse, mare, gelding, colt or filly" are the words used in 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 10. Under an old Act, which only mentioned "horses, geldings, and mares," proof of stealing a *filly* was held to support an indictment for stealing a *mare*: R. *v.* Welland, 1822, R. & R. 494. See R. *v.* Beaney, 1820, R. & R. 416.

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§§ 291—293.

§ 291. When forgery was a capital offence, on prosecutions for that offence great nicety was required in describing the instrument forged. The law, however, is now happily amended, and the punishment for forgery has become less severe but more certain. For the Act of 1861, now governing the law on this subject,[1] by § 42, enacts that, "in any indictment for forging, altering, offering, uttering, disposing of, or putting off, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof." A similar laxity of description is permitted, whenever any person is indicted for engraving or making "any instrument, matter, or thing," or for using or unlawfully possessing any plate, material, or paper on which any instrument, matter, or thing shall have been engraved, made, or printed.[2]

§ 292. Moreover in indictments, too, for offences under the Debtors Act, 1869,[3] or the Bankruptcy Act, 1883,[4] it is sufficient to "set forth the substance of the offence charged, in the words of the Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceeding in, or order, warrant or document of, any court acting under the Bankruptcy Act, 1883."[4]

§ 293. Generally speaking, *the name of the person injured*,[5] and, indeed, the name of every person necessarily mentioned in the indictment,[6] is matter of essential description, and formerly it must have been proved with precision. There is, however,

[1] 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 42.

[2] Id. § 43.

[3] 32 & 33 V. c. 62, § 19; amended by 46 & 47 V. c. 52, § 149, sub-sect. 2.

[4] 46 & 47 V. c. 52, §§ 31, 163—167. "The Irish Debtors Act, 1872," contains a similar provision: 35 & 36 V. c. 57, § 19, Ir.

[5] See, as to the old law on this subject, R. *v.* Biss, 1838, 8 C. & P. 773; R. *v.* Robinson, 1817, Holt, N. P. 595; R. *v.* Campbell, 1843, 1 C. & K. 82; R. *v.* Waters, 1848, 18 L. J. M. C. 53; R. *v.* Willis, 1845, 1 C. & K. 722; R. *v.* Stroud, 1842, 1 C. & K. 187; R. *v.* Sweeny, 1841, Ir. Cir. R. 366; R. *v.* Smith, 1833, 6 C. & P. 151; R. *v.* Evans, 1839, 8 C. & P. 765; R. *v.* Sheen, 1837, 2 C. & P. 765; R. *v.* Hogg, 1841, 2 M. & Rob. 380.

[6] See, as to the old law on this subject, R. *v.* Dunmurry, 1841, Ir. Cir. R. 312; R. *v.* Walker, 1811, 3 Camp. 264; R. *v.* Bush, 1818, R. & R. 372.

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§ 293.

little room for doubt that the court would now, in every case of mere *misnomer*,[1] direct an amendment to be made almost as a matter of course.[2] Still a question may occasionally arise as to what the nature of the amendment ought to be, and as to this, the following rules, therefore, may furnish some guide:—1st. If the name of the injured party cannot be proved, it will suffice to describe him as a person "whose name is to the jurors unknown."[3] 2nd. It is not necessary to describe a party by what is, in strictness, his right name; but it will be sufficient to state any name he has assumed,[4] or by which he is generally known, and the omission of a second christian name has been frequently held to be immaterial.[5] 3rd. An illegitimate child is not entitled to the surname either of the mother or of the putative father, but can only acquire a surname by reputation.[6] 4th. The proper mode of describing a peer is by his christian name and rank in the peerage; but the christian name may be omitted;[7] and it seems that under the degree of a duke, a nobleman may be designated by the simple title of "lord."[8] 5th. Foreigners of rank may be described by their christian names and foreign titles, provided they be generally known by those appellations;[9] or it will suffice, as it seems, to describe them by their christian and surnames, with the addition of the word esquire, that being

[1] See R. *v.* Welton, 1862, 9 Cox, C. C. 297.

[2] Under § 1 of 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), cited ante, § 249.

[3] See R. *v.* Welton, 1862, 9 Cox, C. C. 297.

[4] R. *v.* Norton, 1823, R. & R. 510. See R. *v.* Williams, 1836, 7 C. & P. 298. In R. *v.* Toole, 1857, 26 L. J. M. C. 79, where the only proof of the prosecutor's christian name was the statement of a witness, who said that he had seen the prosecutor sign the charge against the prisoner, and the deposition before the magistrates, and that the signatures of those documents, which the witness identified, corresponded with the name laid in the indictment, the court held that the evidence was sufficient.

[5] Att.-Gen. *v.* Hawkes, 1830, 1 Tyr. 3; R. *v.* Berriman, 1833, 5 C. & P. 601; R. *v.* ——, 1834, 6 C. & P. 408; Williams *v.* Bryant, 1839, 9 L. J. Ex. 47. But see R. *v.* M'Anerney, 1841, Ir. Cir. R. 270.

[6] R. *v.* Waters, 1835, 7 C. & P. 250; R. *v.* Clark, 1818, R. & R. 358.

[7] R. *v.* Frost, 1855, 24 L. J. M. C. 116.

[8] R. *v.* Pitts, 1839, 8 C. & P. 771, where the prosecutor was described as "George Talbot Rice, Lord Dynevor," instead of "George Talbot, Baron Dynevor;" R. *v.* Elliott, 1839, 8 C. & P. 772, where the words were, "The Right Honourable William Fitzhardinge, Lord Segrave," he being an earl. It seems that "Edward, Bishop of Hereford," is not a right description: R. *v.* Pitts, supra.

[9] R. *v.* Gregory, 1846, 15 L. J. M. C. 38, where the prosecutor was held sufficiently described as "Charles Frederick Augustus William, Duke

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§§ 293, 294.

the title which English courtesy confers on foreign noblemen.[1] 6th. If a parent and child bear the same name, it will suffice in an indictment to describe the latter by that name without the addition of "junior."[2] And lastly, where joint-stock companies, trustees, or other joint owners have been injured, several Acts of Parliament have been passed, which render it sufficient in such cases to describe in the indictment one person only by name, and to state that the offence has been committed against that person, and another or others, as the case may be.[3] The same description[4] is allowed, under certain circumstances, in informations or complaints before justices of the peace.

§ 294. In some few instances it has been expressly provided by statute that, to justify a conviction, the name of the injured party need neither be alleged nor proved. For instance, on an indictment against a person for any offence against the Act of 1861 relating to malicious injuries to property, it will suffice to allege and prove that the prisoner did the act charged with intent to injure or defraud, and no allegation or proof is necessary that the prisoner intended to injure or defraud any particular person;[5] the law is the same in prosecutions "for forging, altering, uttering, offering, disposing of, or putting off, any instrument,"[6] or for obtaining, or attempting to obtain, any chattel, money, or valuable security by false pretences;[7]—and, in this last case, the indictment will be good,[7] "without alleging any ownership of the chattel, money, or valuable security." Similarly, in indictments for stealing, or fraudulently destroying,

of Brunswick and Luneberg," his name being Ch. Fr. Aug. Wm. D'Este, and he having ceased to be the reigning Duke; R. *v.* Sulls, 1800, 2 Leach, 861, where, in an indictment for larceny, the goods stolen were held to be properly laid as the property of Victory, Baroness Turkheim, the prosecutrix being an Alsatian lady, whose real name was Selina Victoire. In both these cases the parties were well known by the names used.

[1] R. *v.* Graham, 1791, 2 Leach, 547.

[2] R. *v.* Peace, 1820, 3 B. & Ald. 579; R. *v.* Hodgson, 1831, 1 Lewin, 236; R. *v.* Bland, 1832, 1 Lewin, 149; Sweeting *v.* Fowler, 1815, 1 Stark. R. 106; R. *v.* Bayley, 1835, 7 C. & P. 264. See ante, § 195.

[3] 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 14. See, also, 7 G. 4, c. 46 ("The Country Bankers Act, 1826"), § 9.

[4] 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), § 4.

[5] 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 60. See R. *v.* Newboult, 1872, L. R. 1 C. C. R. 344.

[6] 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 44.

[7] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 88.

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or concealing wills,[1] or for stealing, or fraudulently taking, or maliciously destroying, records or legal documents,[2] or for stealing fixtures attached to any square, street, or place dedicated to public use or ornament,[3] it is not necessary to allege that "the article in respect of which the offence is committed is the property of any person."

§§ 295–6. The prisoner's name is not a matter of essential description, because on this subject the prosecutor may have no means of obtaining correct information. Therefore, if it, or his addition, be wrongly described, or the addition omitted, the court may correct the error, and call upon the prisoner to plead to the amended indictment.[4]

[1] Id. § 29.
[2] Id. § 30.
[3] Id. § 31.
[4] 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 19. See R. *v.* Orchard, 1838, 8 C. & P. 565, where a woman charged with the murder of her husband, being described as "A., the *wife* of B. C.," the record was amended by inserting the word "widow" instead of "wife" (Ld. Abinger).

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CHAPTER II.

CONFINING EVIDENCE TO POINTS IN ISSUE.

§§ 297-8. §§ 297-8. We may now pass to the consideration of the second of the four general rules which have been pointed out[1] as governing the production of evidence. This *second general rule* is, that *the evidence must be confined to the points in issue.* These points having been selected by the parties in their pleadings, as those on which they are respectively willing to rest the fate of the cause,[2] any evidence, in support of other facts, would be obviously improper. Accordingly, in an action of defamation, where the issues raised by the pleas of justification were whether the plaintiff's scholars were "ill-fed, badly lodged, and covered with vermin," defendant's counsel was not permitted to put any questions to show that the boys were also *badly educated.*[3] In another action of the same kind, where the defendant had only pleaded the general issue, Lord Ellenborough would not allow the plaintiff to prove that the assertions contained in the libel were false, observing: "There is no plea of justification on the record, and, therefore, I can no more hear a falsification on the one side than a justification on the other."[4] Where *to an action in contract* (*not* founded, be it observed, on any allegation of fraud) the defendant pleaded the Statute of Limitations, to which there was a replication that he did promise within six years, and the plaintiff did not reply fraud to this plea, but simply denied the fact by taking issue on the plea, the plaintiff was not allowed to prove that the action was grounded *on a fraudulent receipt of money by the defendant, and that the fraud was first discovered within six years* from the commencement of

[1] See supra, § 217.
[2] Steph. Pl. 115.
[3] Boldron *v.* Widdows, 1824, 1 C. & P. 65.
[4] Stuart *v.* Lovell, 1817, 2 Stark. R. 94; Cornwall *v.* Richardson, 1825, Ry. & M. 305.

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the suit;[1] where the breach of covenant for which the action was brought was that defendant had not used the plaintiff's farm in a husbandlike manner, but had committed waste, evidence of bad husbandry *not amounting to waste* was rejected.[2]

§ 298A. The rule that evidence must be confined to the issues does not, of course, exclude testimony bearing on one or more only of several questions raised by an issue which is of a complex nature.[3] Thus, for instance, it may be shown that a defendant was negligent because, to his knowledge, other accidents had previously arisen from the same condition of things[4] (as, *e.g.*, that he knew a machine to be in a dangerous condition because he was aware that others had been injured by it previously to the accident to the plaintiff); that *scienter* must be imputed to the owner of a dog or other animal who kept it after being aware that it had attacked *other* persons; and the existence of a nuisance can only be shown by proof of the mischief which the thing complained of has done to *others* of the public, as well as to the plaintiff or prosecutor.[5] Similarly in actions of libel and slander it is allowable, in proof of the defendant's malice, to give evidence of libels and slanders published by him of the plaintiff other than that charged.[6]

§ 299. The cases just cited, in which evidence was rejected as irrelevant, were decisions under the old rules of pleading. The present rules of the Supreme Court are intended to effect three material objects: first, to make each party acquainted with the intended case of his opponent, and thus to save the expense of collecting unnecessary evidence,[7] and to prevent either side from being taken by surprise at the trial; secondly, to bring *legal* defences more prominently forward on the face of the record;[8] and thirdly, to do away altogether with pleadings in cases where

[1] Clark *v.* Hougham, 1823, 2 B. & C. 149.

[2] Harris *v.* Mantle, 1789, 3 T. R. 307.

[3] Brewing Co. *v.* Beaner, 1893, 40 Am. St. R. 686; and see, also, Brown *v.* Eastern Counties Ry. Co., 1889, 22 Q. B. D. 391.

[4] Blomington *v.* Legg, 1894, 42 Am. St. R. 216. See, also, cases cited in preceding note.

[5] See also post, §§ 336 et seq.

[6] Symmons *v.* Blake, 1835, 1 M. & Rob. 477.

[7] Thorp *v.* Holdsworth, 1876, 3 Ch. D. 639; and see Spedding *v.* Fitzpatrick, 1888, 38 Ch. D. 410.

[8] See Isaac *v.* Farrer, 1836, 5 L. J. Ex. 94; Barnett *v.* Glossop, 1835, 3 Dowl. 625; Gutsole *v.* Mathers, 1836, 5 L. J. Ex. 274; and see Ord. XXV. r. 2.

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§§ 299, 300. they are unnecessary, and to curtail them in all cases. To effect this last object it was provided in the year 1893,[1] that a plaintiff may indorse his writ of summons with a statement sufficient to give notice of his claim or the relief or remedy required, and with a statement that if the defendant appears the plaintiff intends to proceed to trial without pleadings, whereupon, unless the defendant obtains an order to the contrary, the action will proceed to trial without pleadings. The defendant, however, if he intends to rely on certain specified defences, must give notice thereof to the plaintiff. This provision has never been very widely made use of, and in the year 1897 a radical change was made in the practice by requiring a summons to be taken out in all except a few specified cases, upon which summons the direction of the master is obtained as to whether there shall be pleadings in the action or not.[2] It is also provided by the rules,[3] that no reply or pleading subsequent thereto shall be delivered, except in Admiralty actions, without an order for the purpose being obtained.[4]

§ 300. With regard to such pleadings as are now delivered it is provided that "such statements shall be as brief as the nature of the case will admit,"[5] and that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the *evidence* by which they are to be proved."[6] For example, if an agreement be alleged in any pleading, it is not sufficient to aver generally its existence, and to state its effect, but the party relying on it should state whether it be in writing, or by parol, or the result of a series of documents.[7] The phrase "material facts" will include any facts which the party pleading is entitled to prove at the trial.[8] Thus, in an action for breach of promise of marriage, the plaintiff may allege in her statement of claim her consequent seduction or infection, these matters being important by way of aggravation.[9]

[1] Ord. XVIIIA.
[2] Ord. XXX.
[3] By which is meant "reply" proper, not defence to counterclaim.
[4] Ord. XXIII.
[5] Ord. XIX. r. 2.
[6] R. 4. See Heap *v.* Marris, 1876, 2 Q. B. D. 630; Philipps *v.* Philipps, 1878, 34 Beav. 19 (C. A.).
[7] Turquand *v.* Fearon, 1879, 4 Q. B. D. 280 (C. A.).
[8] Millington *v.* Loring, 1880, 6 Q. B. D. 190 (C. A.).
[9] Id.

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§§ 301, 302.

§ 301. Twelve other pleading rules have a material bearing on the Law of Evidence. Rule 13 of Order XIX. provides that "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be *taken to be admitted*,[1] except as against an infant, lunatic, or person of unsound mind not so found by inquisition." By Rule 14, "any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be *implied* in his pleading." Rule 15 provides, that "the defendant or plaintiff, as the case may be, must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law,[2] and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud,[3] the Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." By Rule 16, "No pleading, not being a petition or summons, shall,—except by way of *amendment*,[4]—raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

§ 302. By Rule 17, "it shall not be sufficient for a defendant

[1] See Tildesley *v.* Harper, 1878, 7 Ch. D. 403; 10 Ch. D. 393 (C. A.); Harris *v.* Gamble, 1878, 7 Ch. D. 877; Rutter *v.* Tregent, 1879, 12 Ch. D. 758.

[2] An exception to this proposition is contained in Ord. XXI. r. 21, which provides, that "no defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his *title*, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff." As to this rule, see Danford *v.* M'Anulty, 1883, 8 App. Ca. 456 (H. L.).

[3] See post, § 306.

[4] See, also, Ord. XXIII. r. 6, which provides, that "*no new assignment* shall be necessary or used." But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim, or by way of reply. See Earp *v.* Henderson, 1876, 3 Ch. D. 254, as explained by Hall *v.* Eve, 1876, 4 Ch. D. 341.

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§§ 302, 303. in his statement of defence to deny *generally* the grounds alleged by the statement of claim,[1] or for a plaintiff in his reply to deny *generally* the grounds alleged in the defence by way of counterclaim, but each party must deal *specifically* with each allegation of fact of which he does not admit the truth, except damages." Rule 18 provides that, "subject to the last preceding rule, the plaintiff by his reply, may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading.[2] Such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted." As we have seen, however,[3] no reply or pleading subsequent thereto can, in general, now be delivered without leave, and leave will not be given if a joinder of issue only is necessary. Rule 13 of Order XXVII. further provides that if no reply, or subsequent pleading is delivered, the pleadings shall be deemed to be closed, and all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

§ 303. The general effect of these rules is to do away *in the statement of defence* with what used to be termed by Special Pleaders "the General Issue." Under the old forms of pleading, on an action, which was in form one "ex contractu" (or founded on contract), being brought, whenever the defendant could show that no *debt* in fact existed before action brought, he was allowed to do it under the plea of "never indebted." For example, in an ordinary action for *goods sold and delivered*, the defendant might, under the useful plea of "never indebted," show either that they were paid for by ready money;[3] that they were sold on credit, which was unexpired when the action was commenced;[4] that they were bought through an agent, to whom, before the expiration of the credit, the defendant had remitted the price;[5] that they were sold under a condition, that if they

[1] See Harris *v.* Gamble, 1878, 7 Ch. D. 877; Rutter *v.* Tregent, 1879, 12 Ch. D. 758; Adkins *v.* North Metropolitan Tramway Co., 1893, 63 L. J. Q. B. 361.

[2] Ante, § 299; Ord. XXIII.

[3] Bussey *v.* Barnett, 1842, 11 L. J. Ex. 211. But see Littlechild *v.* Banks, 1845, 14 L. J. Q. B. 356.

[4] Broomfield *v.* Smith, 1836, 5 L. J. Ex. 155; overruling Edmonds *v.* Harris, 1834, 2 A. & E. 414.

[5] Smyth *v.* Anderson, 1849, 18 L. J. C. P. 109.

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did not answer their purpose nothing should be paid for them, and that in fact they did not answer their purpose;[1] that they were sold under any special agreement, which had not been performed;[2] that they were delivered under a contract of barter;[3] that the goods delivered did not answer the description of the articles which the vendor professed to sell;[4] or that they turned out to be utterly useless.[5]

§ 303A. A similar multiplicity of defences was open under the plea of "never indebted" in an action for use and occupation. No useful purpose is to be served by mentioning them in detail.

§ 303B. Now, however, the grounds of defence are in *all* cases (in the two above specified, as well as in others), required to be *specifically set out* in the statement of defence.

§ 303c. While in an action founded on contract a great variety of defences was thus permitted to be raised (without any previous notice to the plaintiff as to which of such possible defences the defendant intended to set up), under the "general issue" (or plea of "never indebted"), in an action founded upon tort a similar variety and choice of defences was allowed under a "plea of the general issue," taking the form of "not guilty." The effect of such a plea is learnedly discussed in Bullen on Pleading.[6] By the Pleading Rules of 1853 the operation of such a plea was considerably restricted. But even after the passing of these rules the plea of "not guilty" had still, in some cases, a wide operation; for instance, in actions for fraud, its operation was to deny that the defendant made the representation charged, that it was false, that he made it either knowing it to be false, or even without a belief in its truth, that he made it with the

[1] Grounsell *v.* Lamb, 1836, 5 L. J. Ex. 154. See Lamond *v.* Davall, 1847, 16 L. J. Q. B. 136.

[2] Broomfield *v.* Smith, 1836, 5 L. J. Ex. 155; Garey *v.* Pyke, 1839, 10 A. & E. 512; Hayselden *v.* Staff, 1836, 5 A. & E. 153; Mosely *v.* M'Mullen, 1856, 6 Ir. C. L. R. 69.

[3] Harrison *v.* Luke, 1845, 14 L. J. Ex. 248; Smith *v.* Winter, 1852, 21 L. J. C. P. 158; Bracegirdle *v.* Hinks, 1854, 23 L. J. Ex. 128.

[4] Gompertz *v.* Bartlett, 1853, 23 L. J. Q. B. 65.

[5] Cousins *v.* Paddon, 1835, 5 L. J. Ex. 49, recognised by Ld. Denman in Hayselden *v.* Staff, 1836, 5 A. & E. 153; Baillie *v.* Kell, 1858, 4 Bing. N. C. 638; Chapel *v.* Hicks, 1833, 3 L. J. Ex. 38; Allen *v.* Cameron, 1833, 3 Tyr. 907. These cases overrule Roffey *v.* Smith, 1834, 6 C. & P. 622.

The plea of "never indebted" is still used in the Mayor's Court of London. For the defences which are open under such a defence, see "The Mayor's Court Practice," by Glyn & Jackson, 2nd edit. at p. 223.

[6] 3rd edit. pp. 697 et seq.

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§§ 303c—306.

intent to induce the plaintiff to act upon it, that the plaintiff did act upon it, and also that the plaintiff sustained damage in consequence of so doing.[1] Again, in respect of slander for words not actionable in themselves, but which are so only by reason of special damage caused by them, a plea of "not guilty" denied the speaking of the words, the speaking of them maliciously, their use in the defamatory sense imputed, and the alleged special damage.[2]

§ 304. The general issue is, by the rules at present in force under the Judicature Act, forbidden to be raised by a statement of defence. But it will be observed that, by Rule 18 of Order XIX., it is still allowed to be contained in the plaintiff's reply, the rule saying that the plaintiff "by his reply *may* join issue upon the defence."[3] And the non-delivery of a reply amounts, as we have seen, to a joinder of issue.[4] The rule in question does not mean that the plaintiff *must* take that course. He may—except in a case where, under the old system of common law pleading, a new assignment would have been necessary,[5]—either amend his claim under Order XXVIII., or having obtained the necessary leave to deliver a reply, traverse the allegations in the defence generally or specially, or confess and avoid them, or unite in one reply those several answers.[6]

§ 305. Thus the whole object of the present system of pleading is to narrow the parties to definite and distinct issues, and thereby to diminish expense and delay, especially as regards the amount of oral testimony required on either side at the trial.[7]

§ 306. This object is further sought to be attained by the help of various rules besides those which have already been cited. Thus Order XIX. r. 20, provides, that "when a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the *legality or sufficiency in*

[1] Bullen on Pleading, ubi supra, p. 701.
[2] Wilby *v.* Elston, 1849, 18 L. J. C. P. 320.
[3] See ante, § 302.
[4] Ante, § 302; Ord. XXVII. r. 13.
[5] See ante, p. 301, n. [4].
[6] Hall *v.* Eve, 1876, 4 Ch. D. 341 (C. A.).
[7] Thorp *v.* Holdsworth, 1876, 3 Ch. D. 637; Byrd *v.* Nunn, 1877, 7 Ch. D. 284 (C. A.); Tildesley *v.* Harper, 1878, 10 Ch. D. 393 (C. A.); Collette *v.* Goode, 1877, 7 Ch. D. 842.

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law, of such contract, promise, or agreement, whether with reference to the *Statute of Frauds* or otherwise." The effect of this rule is, that, whenever a party intends to rely on the illegality or insufficiency in law of any contract, whether with reference to the Statute of Frauds or otherwise, he must *specially* plead such illegality or insufficiency, and it will not be sufficient to traverse allegations made by his opponent in anticipation of objections to the contract upon such grounds.[1] Neither can a defendant avail himself of the Statute of Frauds by simply raising in general terms by his pleading a point of law[2] (the substitute for the old general demurrers[3]), nor will it suffice for him to state generally that he relies on a statute, but the facts which make the statute applicable must distinctly appear on the pleadings.[4]

§ 307. Again, Rule 5 of Order XXI. provides, that "if either party wishes to deny the right of any other party to claim as executor or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically."

§ 308. Sometimes it will be difficult to reconcile this last rule, and also Rule 13 of Order XIX.,[5] with certain express enactments. For example, if in an action on a doctor's bill the statement of claim allege that plaintiff is a "legally qualified medical practitioner,"[6] an omission to specifically deny this statement amounts to an admission of the fact. But the Medical Act of 1858[7] expressly enacts that "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall *prove* upon the trial that he is registered under the Act."

§ 309. Again, it would appear to follow that the objection that an instrument which is invalid in law if not stamped, or if

[1] Clarke *v.* Callow, 1876, 46 L. J. Q. B. 53 (C. A.).
[2] Futcher *v.* Futcher, 1881, 50 L. J. Ch. 735.
[3] Ord. XXV. rr. 1, 2.
[4] Pullen *v.* Snelus, 1879, 48 L. J C. P. 394.
[5] Cited ante, § 301.
[6] See 21 & 22 V. c. 90, § 34.
[7] Id. § 32.

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§§ 309, 310.

insufficiently stamped, is *not* so *stamped*, cannot be taken at the trial by a party who has not relied on that point in his pleading.[1] But when the document is offered in evidence, these pleading rules do not affect the steps which must be taken either by the presiding judge, or by the ministerial officer of the court, to protect the interests of the Revenue.

§ 310. If a defendant desires to contend that the court has no jurisdiction to try the action in which he has been made a defendant, his right course is to move in the Ch. D. or apply by summons in the K. B. D. under the Judicature Act, 1873, § 24, sub-sect. 5, if there are no pleadings, or move in the Ch. D. or apply by summons in the K. B. D. under Order XXV. r. 4, if there are, to stay the action. Apart from Acts and Rules, there is also an inherent jurisdiction in the court to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process[2]—which an action brought in a court without jurisdiction to try it clearly would be. If the defendant has been summoned under an order for substituted service, his right course is to move to set aside that order.[3] A defendant can also raise the point by his defence, and in the Mayor's Court of London must do so (by the "Mayor's Court of London Procedure Act, 1857," § 15), if he intends to rely on it in that court. Should a defendant adopt none of the proper methods of raising the point before the trial, and also not plead it, there is some doubt as to what course the court would pursue at the trial, supposing its want of jurisdiction to then become apparent. Semble, the court would not try an action, knowing itself to be without jurisdiction to entertain it, but the defendant would not be likely to get any costs.[4]

[1] See, as to the old law, Field *v.* Woods, 1837, 7 A. & E. 114; Dawson *v.* Macdonald, 1836, 6 L. J. Ex. 10; M'Dowall *v.* Lyster, 1836, 6 L. J. Ex. 11. See, also, post, § 397.

[2] Haggard *v.* Pelissier, [1892] A. C. p. 68.

[3] Mighell *v.* Sultan of Johore, [1894] 1 Q. B. p. 149.

[4] See Spooner *v.* Juddow, 1848–50, 6 Moo. P. C. C. 257, where the Privy Council decided, that when the facts ousting the jurisdiction are brought by the plaintiff himself to the notice of the court, the mere omission of the defendant to plead specially will not give the court jurisdiction over the suit, but it will be bound, whatever be the nature of the issues raised, either to nonsuit the plaintiff, or to direct a verdict for the defendant, but declined to state what would be the law, if the plaintiff were to close his case without betraying the want of jurisdiction, and the defendant were then, without

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§ 311. The numerous cases in which a defendant was formerly empowered *to plead* "*Not Guilty by statute*," and to give special matter in evidence under such plea, are not affected by the present *pleading rules* further than this, that the party who intends so to plead cannot "plead any other defence to the same cause of action without the leave of the court or a judge;"[1] and must "insert in the margin of his pleading the words 'By Statute,' together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and specify whether such Act is public or otherwise; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament."[2] The importance of this plea, however, is now very much diminished, for the Public Authorities Protection Act, 1893,[3] repeals so much of any public general Act, as enacts that in any proceeding to which the Act applies, the defendant may plead the general issue.

§ 312. Under this form of general issue a defendant may sometimes give special matter in evidence so as to be entitled to rely upon the want of notice of action, or a tender of amends, or on some other special protection given by a particular Act of Parliament. But when such a privilege as this is claimed by virtue of having *acted in an* office, or under a statute, it is extremely difficult to lay down, as an abstract proposition of law, what amounts to such an *acting in pursuance of the statute*, or *in the execution of the office*, as to entitle the defendant to the protection of the statute.[4] This much, however, may safely be stated, that if a party believes, bonâ fide, in the existence of a state of *facts*,[5] which if they had existed, would have afforded a defence to the action,[6] he is,—without reference to the reasonableness

any special plea raising the point, to offer evidence of facts with a view of showing that the cause of action was ultra vires.

[1] Ord. XIX. r. 12.

[2] Ord. XXI. r. 19.

[3] 56 & 57 V. c. 61, § 2.

[4] See Arnold *v.* Hamel, 1854, 23 L. J. Ex. 137, and Kirby *v.* Simpson, 1854, 23 L. J. M. C. 165, where a magistrate, acting in execution of his office maliciously and without reasonable and probable cause, was held entitled by 11 & 12 V. c. 44 ("The Justices Protection Act, 1848"). § 9, now repealed by 57 & 58 V. c. 56), to notice of action.

[5] If there are no facts on which a bonâ fide belief can reasonably be founded, the protection will not apply: Agnew *v.* Jobson, 1878, 47 L. J. M. C. 57.

[6] Hermann *v.* Seneschal, 1862, 32 L. J. C. P. 43; Heath *v.* Brewer,

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§§ 312, 313.

of such belief,[1]—entitled to protection, although he may have proceeded illegally or exceeded his jurisdiction.[2] Statutes of this kind are intended for the protection of honest persons, who bonâ fide mean to discharge their duty;[3] and the court will, consequently, so interpret their provisions, as to save harmless all persons who act illegally under the reasonable belief that they are authorised in what they do by Act of Parliament; and this, too, whether the error complained of has been committed in respect of *time*, *place*, or *circumstance*.[4]

§ 313. Under a plea of "*Not Guilty by statute*," a defendant may, too, clearly set up any defence that could be specially pleaded, whether it be founded wholly or partly on the statute, or be merely sustainable at common law.[5] For example, in an action for an excessive distress, such a plea puts in issue not only the matter of justification, but the tenancy and the ownership of the goods.[6] This being the case, the courts will not, in general,

1864, 15 C. B. (N.S.) 803; Mid. Ry. Co. *v.* Withington Local Board, 1883, 11 Q. B. D. 788 (C. A.); Roberts *v.* Orchard, 1863, 33 L. J. Ex. 65. See Downing *v.* Capel, 1867, L. R. 2 C. P. 461; Selmes *v.* Judge, 1871, L. R. 6 Q. B. 724.

[1] Chamberlain *v.* King, 1871, L. R. 6 C. P. 474. Prior to this decision, it was thought by many that the belief, to be available, must have rested "on some colour of reason." See Cann *v.* Clipperton, 1839, 10 A. & E. 582; Cook *v.* Leonard, 1827, 6 B. & C. 351; as qualified in Jones *v.* Gooday, 1842, 9 M. & W. 743. See, also, Kine *v.* Evershed, 1847, 16 L. J. Q. B. 271; Leete *v.* Hart, 1868, L. R. 3 C. P. 322; Spooner *v.* Juddow, 1848–50, 6 Moo. P. C. C. 257; Booth *v.* Clive, 1851, 20 L. J. C. P. 151; Read *v.* Coker, 1853, 22 L. J. C. P. 201; Arnold *v.* Hamel, 1854, 9 Ex. 404; Hermann *v.* Seneschal, 1863, 32 L. J. C. P. 43.

[2] Hazeldine *v.* Grove, 1842, 3 Q. B. 997; Spooner *v.* Juddow, 1848–50, 6 Moo. P. C. C. 257; Jones *v.* Gooday, 1842, 9 M. & W. 743; Theobald *v.* Crichmore, 1818, 1 B. & Ald. 227. See, further, Eliot *v.* Allen, 1845, 14 L. J. C. P. 136; Shatwell *v.* Hall, 1842, 12 L. J. Ex. 74; Hopkins *v.* Crowe, 1836, 4 A. & E. 774; Lidster *v.* Borrow, 1839, 9 A. & E. 654; Bush *v.* Green, 1837, 7 L. J. C. P. 38; Smith *v.* Shaw, 1829, 10 B. & C. 277; Davis *v.* Curling, 1845, 15 L. J. Q. B. 56; Cox *v.* Reid, 1849, 18 L. J. Q. B. 216; Thomas *v.* Stephenson, 1853, 22 L. J. Q. B. 258; Newton *v.* Ellis, 1855, 24 L. J. Q. B. 337; Poulsum *v.* Thirst, 1867, L. R. 2 C. P. 449.

[3] Per Parke, B., in Jones *v.* Gooday, 1842, 9 M. & W. 743.

[4] Hughes *v.* Buckland, 1846, 15 L. J. Ex. 233; Horn *v.* Thornborough, 1849, 18 L. J. Ex. 349.

[5] Ross *v.* Clifton, 1841, 10 L. J. Q. B. 233; Maund *v.* Monmouth Can. Co., 1842, C. & Marsh. 606; (Cresswell, J., stating the general opinion of the judges); Fisher *v.* Thames Junc. Ry. Co., 1837, 5 Dowl. 773; Haine *v.* Davey, 1836, 4 A. & E. 892; Eagleton *v.* Gutteridge, 1843, 12 L. J. Ex. 359.

[6] Williams *v.* Jones, 1841, 11 A. & E. 643. Formerly it also enabled a defendant to dispute the character in which plaintiff sued: Tharpe *v.* Stallwood, 1843, 12 L. J. C. P. 241. But see, now, Ord. XXI. r. 5, set out at § 307.

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allow a defendant to plead "not guilty by statute," together with any other defence; but if a reasonable doubt exists as to whether the defendant, in regard to the particular act complained of, is entitled to such a plea, the rule will, in favour of substantial justice, be sometimes relaxed.[1]

§ 314. It may be added in connection with this subject that[2] so much of any clause or provision in any Act commonly called Public local and personal, or Local and personal, or in any Act of a local and personal nature,[3] whereby any party was entitled, before the 10th of August, 1842, to give special matter in evidence under the general issue, is repealed. The Irish Common Law Procedure Act of 1853,[4] also repeals, by § 69, "so much of any Act of Parliament as entitles or permits any person to plead the general issue only, and to give special matter in evidence without pleading the same."

§ 315. It will be recollected that a general protection to public authorities is, in lieu of the plea of "Not Guilty," now afforded by the provisions of the Public Authorities Protection Act, 1893,[5] within which is included every *justice* of the peace, sued for anything done by him in the *execution of his office*.[6] There are, however, still in existence various statutes empowering defendants to plead the general issue, and to tender or pay into court amends for the injury complained of. In many of these (but not in all of them[7]) it is expressly enacted that tender of amends or payment into court shall be specially pleaded.[8]

§ 315A. The general rule of law, as stated above,[9] which limits proof to the matters put in issue by the pleadings, has been supplemented by express enactment, as regards actions for

[1] Langford *v.* Woods, 1844, 8 Scott, N. R. 369.

[2] By 5 & 6 V. c. 97, § 3.

[3] As to the meaning of this phrase, see Richards *v.* Easto, 1846, 15 L. J. Ex. 163; Cock *v.* Gent, 1843, 13 L. J. Ex. 24; Barnett *v.* Cox, 1847, 16 L. J. M. C. 27; Pilkington *v.* Riley, 1849, 18 L. J. Ex. 323; Shepherd *v.* Sharp, 1856, 25 L. J. Ex. 254.

[4] 16 & 17 V. c. 113, Ir.

[5] 56 & 57 V. c. 61, ante, § 73.

[6] See 56 & 57 V. c. 61 ("The Public Authorities Protection Act, 1893"), ante, § 73A; and on the construction of a repealed Act (11 & 12 V. c. 44, s. 9), see Kirby *v.* Simpson, 1854, 23 L. J. M. C. 165, cited ante, notes to § 312.

[7] See, *e.g.*, "The Seaman's Clothing Act, 1869" (32 & 33 V. c. 57), § 6; and, also, 11 G. 2, c. 19 ("The Distress for Rent Act, 1737"), §§ 20, 21; amended by "The S. L. Rev. Act, 1888" (51 V. c. 3).

[8] See 45 & 46 V. c. 50 ("The Municipal Corporations Act, 1882"), § 226, sub-sect. 2.

[9] In §§ 298 et seq.

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§§ 315a, 316.

infringement of patents, by the Patents, Designs, and Trade Marks Act, 1883.[1]

§ 316. The rule confining evidence to the points in issue not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the *mode* of proving even the issues themselves. Thus,[2] it excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute. The reason is that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead; while the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble, light on the question in issue. The circumstances of the parties to the suit, and the position in which they stood[3] when the matter in controversy occurred, are generally proper subjects of evidence; and, indeed, the change in the law enabling parties to give testimony for themselves, has

[1] 46 & 47 V. c. 57. § 29 of this Act provides as follows:—

"(1.) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the court or the judge, at any subsequent time, particulars of the breaches complained of.

"(2.) The defendant must deliver with his statement of defence, or, by order of the court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof.

"(3.) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and, if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him.

"(4.) At the hearing no evidence shall, except by leave of the court or a judge, be admitted in proof of any alleged infringement or objection, of which particulars are not so delivered.

"(5.) Particulars delivered may be from time to time amended, by leave of the court or a judge.

"(6.) On taxation of costs, regard shall be had to the particulars delivered by the plaintiff and by the defendants; and they respectively shall not be allowed any costs in respect of any particular delivered by them, unless the same is certified by the court or a judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case."

[2] Gr. Ev. § 52, in part for six lines.

[3] See Woodward v. Buchanan, 1870, L. R. 5 Q. B. 285.

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rendered this proof of "*surrounding circumstances*" still more important than it was in former times.[1] Accordingly, in an action for money lent, the poverty of the alleged lender is a very relevant fact, evidence of which is admissible for the purpose of disproving the loan.[2]

§ 317. The most important facts which are excluded on the ground of *irrelevancy*, are the acts and declarations, either of strangers, or of one of the parties to the action in his dealings with strangers. These, in technical language, are denominated "*res inter alios actæ*."

§ 318. A good example of matters being excluded for irrelevancy, and as "*res inter alios actæ*," is that in an action to recover goods by his assignees against a bankrupt's creditor, proof of the commission of acts of bankruptcy, by showing that *other* goods which, about the same time, had been delivered to other creditors before the goods in dispute came into defendant's hands, had been got back from them, was rejected. It was suggested that the conduct of such other creditors bore upon the case which was being tried, as it showed the conviction of the other creditors that they had received the goods under circumstances which did not entitle them to keep possession. But as their opinions, expressed after the fiat, could not have been received as evidence, so also evidence of their acts, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupt, was inadmissible.[3] To return, proof of the usage of a particular estate, however extensive it may be, is inadmissible for the purpose of importing into the lease of a farm on that estate some special stipulations relative to the mode of cultivation;[4] on a question between landlord and tenant, whether rent be payable quarterly or half-yearly, evidence of the mode in which other tenants of the same landlord pay their rent is rejected;[5] and where it was necessary for a brewer to prove that he had supplied a publican with good beer, other publicans were not

[1] Dowling *v.* Dowling, 1860, 10 Ir. C. L. R. 244 (Pigot, C.B.).
[2] Dowling *v.* Dowling, 1860, 10 Ir. C. L. R. 236.
[3] Backhouse *v.* Jones, 1839, 6 Bing. N. C. 65.
[4] Womersley *v.* Dally, 1857, 26 L. J. Ex. 219.
[5] Carter *v.* Pryke, 1791, Peake, 95.

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§§ 318—320.

allowed to show that, during the same period as the dealing in question, he had furnished them with beer of an excellent quality, for a man may deal well with some of his customers, though not with others.[1]

§ 319. Again, where the issue is whether the plaintiff's scholars have been ill-fed, although evidence is admissible to show the *general* treatment of boys at schools, a witness may not be asked as to the comparative quality of the provisions supplied by the plaintiff with those consumed in a *particular* school;[2] in an action against a married woman, where there is an issue whether she had represented herself to the plaintiff as a feme sole, and he had dealt with her as such, evidence of the defendant's dealings with other tradesmen is only admissible, if at all, on the ground that she had held herself out to others as a single woman in such a manner as to reach plaintiff's ears;[3] in an action by the indorsee against the acceptor of a bill, where the defence is that the acceptance is a forgery, evidence that a collection of bills, on which the defendant's acceptance was forged, had been in plaintiff's possession, and that some of them had been circulated by him, was rejected, as no distinct proof was given that the bill in question had *ever formed part of that collection*.[4] But in an action for a nuisance to a highway by placing a heap near it, evidence that *other* horses (as well as plaintiff's) had shied at it goes to prove that that particular heap is a nuisance, and such evidence is accordingly admissible.[5]

§ 320. The two cases last cited point us to an *exception* to the rule under discussion, which is, that evidence of facts which, though

[1] Holcombe *v.* Hewson, 1810, 2 Camp. 291. See, also, Hollingham *v.* Head, 1856, 27 L. J. C. P. 241; Rew *v.* Hutchins, 1861, 10 C. B. (N.S.) 829; Howard *v.* Sheward, 1866, L. R. 2 C. P. 148. As to the application of the rule in the Probate Court, see Young *v.* Holloway, [1895] P. 87.

[2] Boldron *v.* Widdows, 1824, 1 C. & P. 65.

[3] Barden *v.* Keverberg, 1837, 2 M. & W. 61. See Smith *v.* Wilkins, 1833, 6 C. & P. 180, where, the question being whether credit was given to defendant's wife or to her father, evidence that other tradesmen had given credit to the father was rejected by Tindal, C.J. Also Delamotte *v.* Lane, 1840, 9 C. & P. 261.

[4] Griffits *v.* Payne, 1839, 11 A. & E. 131; Thompson *v.* Mosely, 1833, 5 C. & P. 502; Viney *v.* Barss, 1795, 1 Esp. 293; Balcetti *v.* Serani, 1792, Peake, N. P. 142. Such evidence would be clearly inadmissible in an indictment for forgery (Ld. Denman).

[5] Brown et ux. *v.* Eastern Counties Ry., 1889, 22 Q. B. D. 391 (C. A.).

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§§ 320, 321.

collateral, are proved to be *connected* by some general link with the matter in issue, is admissible. There are numerous other instances of the recognition of this exception. Thus, although the *customs* of one *manor* usually cannot be given in evidence to prove the customs of another,[1] yet such customs become evidence the moment that a foundation has been laid for their admission, by clear proof of a sufficient connection between the two manors. The mere fact that two manors lie within the same parish and leet, nor even that the one was a subinfeudation of the other, will not be sufficient; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs.[2] If, however, it can be satisfactorily proved that the customs in the two manors are identical, or that the one was derived from the other after the time of Richard the First, then the customs of each will respectively become evidence.[3] Moreover, whenever the custom in question is as to a particular incident of a general tenure proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure for the purpose of showing what is the custom of the other as to the same.[4] For instance, prove in a particular manor that borough English or gavelkind prevails, and then you may see from other manors what are the peculiarities of these tenures.[5]

§ 321. Similarly, in the manors on the border between Scotland and England,[6] a particular species of tenure, called tenant-right, and in the manors in the mining districts of Derbyshire and Cornwall, particular customs, as to the rights of the miners and the rights to the minerals, prevail. If in one of these no example can be adduced of what is the custom in any particular case, in order to explain the nature of the tenure or

[1] M. of Anglesey *v.* Ld. Hatherton, 1842, 12 L. J. Ex. 57; Furneaux *v.* Hutchins, 1778, 2 Cowp. 807; Doe *v.* Sisson, 1810, 12 East, 62.

[2] M. of Anglesey *v.* Ld. Hatherton, 1842, supra.

[3] Id.

[4] Id.; Stanley *v.* White, 1811, 14 East, 338; R. *v.* Ellis, 1813, 1 M. & Selw. 662; D. of Somerset *v.* France, 1727, 1 Str. 654; Champian *v.* Atkinson, 1672, 3 Keb. 90; explained (Rolfe, B.) in M. of Anglesey *v.* Ld. Hatherton, 1842, sup a.

[5] M. of Anglesey *v.* Ld. Hatherton, 1842, supra.

[6] Rowe *v.* Parker, 1792, 5 T. R. 31.

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§§ 321—323.

right in question, evidence is admissible to show what is the general usage with respect to that tenure or right.[1]

§ 322. Accordingly, too, upon a question whether the Crown in right of the Duchy of Lancaster, had the exclusive privilege, under an original charter, of appointing a coroner within the honour of Pontefract, evidence of appointments of coroners, and of their acting, in other parts of the same duchy, was admitted.[2] On the same principle, the mode of conducting a particular branch of trade in one place may be proved by showing the manner in which the same trade is carried on in another place.[3] And where there is a dispute as to the exact line of boundary between manors, evidence that the alleged boundary is a *natural* one, and bounds one of the manors from certain other manors (not the subjects of controversy) is admissible, because the boundary being a *natural* one, equally suitable in both cases, it is highly unlikely to have been varied.[4]

§ 323. Where, too, the question is whether a slip of waste land, lying between the highway and the enclosed lands of the plaintiff, belongs to him, or to the lord of the manor,—the lord may give evidence of acts of ownership on other parts of the waste land between the *same* road and the enclosures of other persons, although at the distance of two miles from the spot in dispute, and although the continuity of the waste be interrupted.[5] Again, where, in trespass, the plaintiff's object is to prove himself owner of the entire bed of a river flowing between his land and that of the defendant, and thus rebut the presumption that each party is entitled ad medium filum aquæ,[6] he may give evidence of acts of ownership exercised by himself upon the bed and banks of the river lower down the stream on the defendant's side, where the *same* river flows between the plaintiff's land and the farm of a third party, or of repairs done, beyond the limits of the defendant's land, to a fence dividing defendant's and

[1] M. of Anglesey *v.* Ld. Hatherton, 1842, 12 L. J. Ex. 57; Rowe *v.* Brenton, 1828, 8 B. & C. 758.

[2] Jewison *v.* Dyson, 1842, 11 L. J. Ex. 401. See Fleet *v.* Murton, 1871, L. R. 7 Q. B. 126.

[3] Noble *v.* Kennoway, 1780, 2 Doug. 513.

[4] Briscoe *v.* Lomax, 1838, 8 A. & E. 198.

[5] Doe *v.* Kemp, 1831, 7 Bing. 336, recognised (Parke, B.) in Jones *v.* Williams, 1837, 2 M. & W. 327; Bryan *v.* Winwood, 1808, 1 Taunt. 208; Dendy *v.* Simpson, 1856, 18 C. B. 831.

[6] Ante, § 119.

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other land from the river, which runs for a considerable distance along the side of the stream, till at last it comes actually opposite to the extremity of the plaintiff's property on the other side.[1]

§ 324. The same principle applies to the case of mines. Therefore, on a claim founded upon a demise of all mines and minerals under a large contiguous area, evidence of working under one part of the surface is evidence of possession of the entire subject of demise.[2]

§ 325. In cases, as those above referred to, it is for the judge to decide,[3] whether such an unity of character exists between the

[1] In Jones *v.* Williams, 1837, 2 M. & W. 327, Parke, B., observes:— "I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and, consequently, the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; *evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did.* In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence, for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not enclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary surrounding the whole; and the case of Stanley *v.* White (1811, 14 East, 332), I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. It has been said in the course of the argument, that the *defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves proprio vigore, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight.*" See, also, R. *v.* Brightside, Bierlow, 1849, 19 L. J. M. C. 50; Peardon *v.* Underhill, 1850, 20 L. J. Q. B. 133; Donegall *v.* Templemore, 1858, 9 Ir. C. L. R. 374; and In re Belfast Dock Act, 1866-7, Ir. R. 1 Eq. 128, 142.

[2] Taylor *v.* Parry, 1840, 1 M. & Gr. 604.

[3] Doe *v.* Kemp, 1831, 7 Bing. 336; ante, § 24.

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§§ 325, 326.

spot in dispute and the parcel of land over which acts of ownership have been exercised, as to lead to the fair inference that both are subject to the same rights, and constitute in fact but parts of an entire property. If no such inference can be raised, evidence of acts done beyond the limits of the locus in quo will be inadmissible. For example, where it was attempted to connect parcels of waste land with each other, by merely showing that they all lay within the same manor, and between enclosures and public roads, evidence of acts of ownership over some of these lands was held inadmissible to prove title to the others.[1]

§ 326. The rule that evidence must be strictly confined to the points in issue (as limited in the manner above stated), applies with even greater force to *criminal* than to civil proceedings. An indictment should afford distinct information to the prisoner of the specific charge about to be brought against him. Therefore, the admission of any evidence of facts unconnected with that charge, and relating to acts alleged to have been done at a different time or place, would be clearly open to the serious objection of taking the prisoner by surprise. No man should be bound, at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to submit to such an ordeal.[2] Consequently, if on an indictment for burglariously

[1] Doe *v.* Kemp, 1835, 2 Bing. N. C. 102. Ld. Denman, in giving judgment, observes:—"If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another, in the same manor, although both may be similarly situated with respect to the highway; assuming that all were originally the property of the same person, as the lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels, which from their local situation may be deemed parts of one waste or common; acts of ownership in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common." See, also, Tyrwhitt *v.* Wynne, 1819, 2 B. & Ald. 554; Hollis *v.* Goldfinch, 1823, 1 B. & C. 205.

[2] Fost., C. L. 246. Note the distinction between such cases and those where a charge necessarily *involves* some other distinct offence to have been committed *at the same time and place*, as to which, see ante, §§ 265 et seq.

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§ 326.

entering a house on a certain day and stealing goods therein, the prosecutor fail in proving that any larceny was committed on that occasion, he cannot abandon the charge of burglary, and then proceed to show that the prisoner stole some of the articles mentioned in the indictment on a *previous* occasion; because that would be trying the prisoner for one offence and convicting him for another, and a prisoner, having been led to suppose that he was to meet a charge of burglary, cannot be expected to come prepared to prove his innocence with respect to a distinct offence, committed at a totally different time.[1] Accordingly, too, an admission by a prisoner that he has, *at another time*, committed an offence similar to that with which he is charged, and indicating a tendency to perpetrate such crimes, cannot be received.[2] In criminal cases this rule, where the prisoner himself gives evidence, has been extended to cross-examination. A prisoner, subject to certain qualifications, is protected, by the statute enabling him to give evidence, from cross-examination as to facts unconnected with the charge he is tried upon tending to showing that he has been convicted of other offences which would otherwise have been admissible as testing his credit.[3] By the Treason Act of W. 3, on a charge of *treason*, no overt act amounting to a distinct independent charge, though falling under the same head of treason, can be given in evidence, unless it be either itself expressly alleged in the indictment, or be direct proof of some or one of the overt acts which are there laid.[4]

[1] R. *v.* Vandercomb, 1796, 2 Lea. 708.

[2] R. *v.* Cole, 1810, 1 Ph. Ev. 508 (by all the judges); Makin *v.* Att.-Gen. of New South Wales, [1894] A. C. 57.

[3] 61 & 62 V. c. 36 ("The Criminal Evidence Act, 1898"), § 1 (*f*) of which Act provides that a person called as a witness in pursuance of the Act shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless (i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii.) he has given evidence against any other person charged with the same offence.

[4] 7 W. 3, c. 3 ("The Treason Act, 1695"), § 8, as explained in Fost., C. C. 245, citing Ambrose Rookwood's case, 1696, 13 How. St. Tr. 139; 16 How. St. Tr. 93; Lowick's case, 1696, 13 How. St. Tr. 267; Layer's

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§ 327. § 327. Although evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is inadmissible for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried, yet the mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[1] Thus, when the several *felonies* are so connected together as to form part of one entire transaction, evidence of one felony may be given to show the character of the other.[2] Thus, on an indictment for stealing 6*s*. from a till, evidence was received that on one occasion, when the till contained marked silver and other money, amounting in all to 12*s*. 6*d*., the prisoner went to it, and it was afterwards found to contain 11*s*. 6*d*. only, and that on subsequent examinations of the till the money was perceived to have gradually diminished, and that, on the prisoner being searched, 8*s*. of the marked money was found on his person; for though each taking was a separate felony, they were also connected together as mutually to illustrate and prove each other.[3] So where the lessee of a coal-mine had run levels from his own shaft into his neighbours' mines, and had, during a period of four years, been constantly

case, 1722; Deacon's case, 1746, 18 How. St. Tr. 365; and Wedderburne's case, 1746, 18 How. St. Tr. 425. Accordingly, on an indictment for adhering to the King's enemies on the high sea, where the overt act laid was the prisoner's cruising in a vessel called the Loyal Clencarty, evidence that he had some time before cut away the custom-house barge, and gone a cruising in her, was rejected: Vaughan's case, 1696, 13 How. St. Tr. 485. Foster, p. 246, explains this Act by saying:—"Had not those concerned in state prosecutions out of their zeal for the publick service sometimes stept over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case, since the common law, grounded on the principles of natural justice, hath much the like provision in every other"—a different view to that taken by Bishop Burnett in his "History of Our Own Times," vol. ii. 141, who says:—"The design of it seemed to be to make man as safe in all treasonable practices as possible."

[1] Makin *v.* Att.-Gen. for New South Wales, [1894] A. C. 57; and see R. *v.* Wyatt, [1904] 1 K. B. 188.

[2] R. *v.* Ellis, 1824, 6 B. & C. 147; Roupell *v.* Haws, 1863, 3 F. & F. 784; R. *v.* Rearden, 1864, 4 F. & F. 76.

[3] R. *v.* Ellis, 1826, 6 B. & C. 147.

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extracting coal belonging to thirty different proprietors, an indictment charging him in one and the same count with stealing the coal of each of these proprietors was held valid; and the judge allowed the prosecutor to give evidence in support of all the charges as furnishing proof of a felonious intent.[1]

§ 328. Again, where four indictments against a woman respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, on the trial of the first indictment evidence was admitted that arsenic must have been taken by the three sons a few months after their father's death; that all the four parties, when taken ill, exhibited the same symptoms; and that the woman, who had lived in the same house with her husband and children, had been in the habit of preparing their meals, such evidence going to prove, first, that the husband (the subject of the indictment that was then being tried) died of arsenic, and next, that his death had not been accidental.[2] Where, too, a man committed three burglaries in one night, and left at one of the houses property taken from another, the three felonies were considered so connected that the court could hear the history of all;[3] and similar evidence was received where a prisoner was charged on three indictments with firing three stacks belonging to separate parties, within sight of each other, which had all been set on fire at about the same time.[4] On a charge against a mother for poisoning her child, evidence of the death of other children by the same poison was held admissible.[5] On a charge against a mother for murdering her child by suffocation in bed, evidence was admitted of the deaths of other children on previous occasions.[6]

[1] R. *v.* Bleasdale, 1848, 2 C. & K. 765. See R. *v.* Firth, 1869, L. R. 1 C. C. R. 172, where the prisoner was indicted for stealing gas; R. *v.* Henwood, 1870, 11 Cox, C. C. 526.

[2] R. *v.* Geering, 1849, 18 L. J. M. C. 215 (Pollock, C.B., after consulting Alderson, B., and Talfourd, J.); R. *v.* Flanagan, 1882, 15 Cox, C. C. 463 (Brett, J.); R. *v.* Garner, 1864, 3 F. & F. 681; R. *v.* Cotton, 1873, 12 Cox, C. C. 400. See post, § 340. But see R. *v.* Winslow, 1860, 8 Cox, C. C. 397.

[3] Cited by Ld. Ellenborough in R. *v.* Wylie, 1804, 1 Bos. & P. N. R. 94; R. *v.* Stonyer, 1843, 3 Russ. C. & M. 371. See, also, Alison, Cr. L. 313, 314, and Wills, Cir. Ev. 58—60, for remarkable cases of a similar nature which occurred in Scotland.

[4] R. *v.* Long, 1833, 6 C. & P. 179; R. *v.* Cobden, 1862, 3 F. & F. 833.

[5] R. *v.* Cotton, 1873, 12 Cox, C. C. 400.

[6] R. *v.* Roden, 1874, 12 Cox, C. C. 630.

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§§ 328—329a. Upon an indictment for murder by poison of S., evidence is admissible of the previous death of J., and of the subsequent death of L. under like circumstances and attended by similar symptoms, to show the poisoning was not accidental, and the motive being an insurance on the life of S., evidence may be given to show a like motive in the cases of J. and L.[1] In a case before the Privy Council it was held that on an indictment for the murder of an infant, in order to prove malice and to rebut the defence of accident, the prosecution could show the prisoner had received other infants, the circumstances of their reception, and the subsequent burial in the prisoner's back yard.[2]

§ 329. In connection with the principle that *criminal* cases are governed by the general rule that evidence of facts cannot be given *except* where it is shown to be immediately connected in some way with the transaction which is the immediate subject of the inquiry, we may usefully consider the special rules of law, called the *doctrine of election.*

§ 329A. Now, in point of law, no objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind.[3] Indeed, on the face of the record, every count purports to be of a separate offence, and each count in the indictment is for the purposes of evidence and judgment a separate indictment,[4] and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment.[5] In cases of felony, however, this rule has, from motives of humanity, been considerably modified, as an indictment containing several distinct charges of felony is calculated to embarrass a prisoner in his defence. It is now the

[1] R. *v.* Heesom, 1878, 14 Cox, C. C. 40; R. *v.* Gray, 1866, 4 F. & F. 1098, 1102; R. *v.* Dale, 1889, 16 Cox, 703; R. *v.* Neil Cream, 116 C. C. C. Sess. Pap. 1451.

[2] Makin *v.* Att.-Gen. for New South Wales, [1894] A. C. 57.

[3] R. *v.* Kingston, 1806, 8 East, 41; R. *v.* Jones, 1809, 2 Camp. 131; Young *v.* R., 1789, 3 T. R. 98; R. *v.* O'Donnell, 1848, 7 St. Tr. (N.S.) 637; R. *v.* Hinley, 1843, 3 M. & Rob. 524; O'Connell *v.* R., 1843, 5 St. Tr. (N.S.) 1. As to election in civil cases, see Howard *v.* Newton, 1843, 2 M. & Rob. 503.

[4] Young *v.* R., 1789, 3 T. R. 98.

[5] R. *v.* Jones, 1809, 2 Camp. 131; R. *v.* Levy, 1819, 2 Stark. R. 458. See, also, R. *v.* Finucane, 1833, 5 C. & P. 551; R. *v.* Collier, 1831, 5 C. & P. 160. But see R. *v.* Barry, 1865, 4 F. & F. 392.

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practice for the judge to call upon the prosecutor to elect one felony, and to confine himself to that,[1] unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction, in which latter event an "election" will not be enforced.[2] Even in misdemeanors, if the judge be satisfied that to try the prisoner for several misdemeanors together would be unjust to the prisoner, he may put the prosecutor to a similar election, but this would not be done, as a matter of course, as it would be in a case of two or more felonies.[3]

§ 330. In general if a prisoner be charged with knowingly receiving several stolen articles, and it be proved that they were received at separate times, the prosecutor may be put to his election. But if it be possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of the accusation.[4] The court, too, refused to put the prosecutor to an election, but heard the whole story, in a case where several prisoners were charged in different counts of the same indictment with successive rapes upon the prosecutrix, and with aiding each other in turn.[5] A similar course has been followed where an indictment contained five counts for setting fire to five houses belonging to different owners, and it appears that the houses were in a row, and that one fire burnt them all;[6] so, also, it was where an indictment, in the same count, charged four prisoners with assaulting and robbing two persons, who were walking together at the time when they were attacked;[7] and also in a case where the defendant was charged in a single count with uttering several forged receipts (even as many as twenty-two) purporting to be signed by different persons, with intent to defraud, it being alleged that all were uttered at one

[1] R. *v.* Ward, 1864, 10 Cox, C. C. 42. That was an indictment with three counts for sending three threatening letters. Held, that prosecutor must elect to proceed on one count.

[2] Young *v.* R., 1789, 3 T. R. 98; R. *v.* Levy, 1819, 2 Stark. R. 458; R. *v.* Birdseye, 1830; 4 C. & P. 386. See, also, Anon., 1841, Ir. Cir. R. 374.

[3] Castro *v.* R., 1881, 6 App. Ca. 244; R. *v.* King, [1897] 1 Q. B. 216.

[4] R. *v.* Dunn, 1826, 1 Moody, C. C. 146; R. *v.* Hinley, 1843, 2 M. & Rob. 524.

[5] R. *v.* Folkes, 1832, 1 Moody, C. C. 354; R. *v.* Gray, 1835, 7 C. & P. 164; R. *v.* Parry, 1837, 7 C. & P. 836.

[6] R. *v.* Trueman, 1839, 8 C. & P. 727.

[7] R. *v.* Giddins, 1842, C. & Marsh. 634.

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§§ 330—334. and the same time, and the proof corresponding with this allegation.[1]

§ 331. It is provided by statute that in an indictment for High Treason there may be different counts in the same indictment, each charging the accused with a different species of treason, such as compassing the King's death, levying war, adhering to the King's enemies, within 25 Ed. 3, st. 5, c. 2, and the conspiracies to imprison and do bodily harm to the Queen, under 36 G. 3, c. 7, and this power extends to treason felonies, 11 & 12 V. c. 12, § 12.[2] It is also provided by statute that in the case of embezzlement by clerks, servants, and persons employed in the public service, or in the police, distinct acts, not exceeding three, may be charged in one indictment, if committed against the same master, and within six calendar months from the first to the last of such acts.[3]

§ 332. In the case of larceny, again, it is by statute provided that several counts may be inserted in the same indictment for distinct acts of stealing, not exceeding three, which may have been committed by the prisoner against the same person within the space of six calendar months.[4] If, moreover, upon the trial of any indictment for larceny, the property alleged to have been stolen at one time shall turn out to have been taken at different times, the prosecutor shall not be put to his election, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings.[5] In either of these last events the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as have occurred within six months of each other.[5]

§§ 333—4. In the case, too, of receivers of stolen goods, it is also by statute provided[6] that if the inquiry relate to a single criminal act, one or more counts for feloniously stealing property may be joined in the same indictment with one or more counts

[1] R. *v.* Thomas, 1800, 2 Lea. 877.
[2] R. *v.* Mitchel, 1848, 6 St. Tr. (N.S.) 599.
[3] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 71. See R. *v.* Balls, 1871, L. R. 1 C. C. R. 328.
[4] 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 5.
[5] Id. § 6.
[6] Id. § 92.

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charging the felonious receipt of the same property by the prisoner, he well knowing it to have been stolen.[1]

§ 335. It is now time to return to the consideration of the exceptions to the general rule that evidence of collateral facts is not usually receivable. The first exception to this general rule, which we were considering when we entered upon a digression as to the law of election is, it will be remembered, the exception embodied in the rule that evidence of collateral facts is received when such facts are connected with the transaction which is the subject of inquiry. A second *exception* to the general rule, which lays down that evidence of collateral facts cannot be received, arises where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to *illustrate the opinions* of scientific witnesses. For example, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.[2] If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that, after proof by a medical man, or (in a civil case) an admission by counsel, that madness is often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admissible in support of the negative proposition; and on a question of disputed paternity, once prove as a matter of science that children are apt to inherit the features or general appearance of their parents, and then, as a matter of course, evidence will be received of personal resemblance between the party in question and his alleged father.[3]

§ 336. Yet a third exception to the general rule which, in criminal cases, excludes evidence of collateral facts, is that in such cases evidence of such collateral facts is not excluded,

[1] R. *v.* Beeton, 1849, 1 Den. 414. See R. *v.* Hughes, 1860, 29 L. J. M. C. 71.

[2] Folkes *v.* Chadd, 1782, 3 Doug. 157; M'Fadden *v.* Murdock, 1867, Ir. R. 1 C. L. 211.

[3] Bagot *v.* Bagot, 1878, 1 L. R. Ir. 308.

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§§ 336—338. when it can raise a fair inference respecting the matter in issue by either tending to show a prisoner's *identity* or to *corroborate* the testimony of a witness in some material particular. For example, on an information for a libel, where the printer swore that he had received the manuscript from the defendant, and had returned it to him, and notice to produce it had been given to the defendant, other libels written by him concerning the same subject were received to corroborate the statement of the printer;[1] where a prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similar, but ineffectual, attempt on the following evening, when the prisoner brought a duplicate pawn-ticket for the coat, which was found on him at the time of his apprehension, was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day;[2] on a charge of highway robbery, the prosecutor was allowed to rebut an alibi, by proving that, shortly before the attack upon him, and near the same spot, the prisoner had robbed another person;[3] and even had no such defence been set up, similar evidence would, it seems, have been admissible, as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed.[4]

§ 337. The exception just stated also prevails in civil causes. For instance, where a party was sued on a bill of exchange, accepted in his name by another person, and evidence had been given that this person had a general authority from the defendant to accept bills in his name, an admission by the defendant of his liability on another bill so accepted was held receivable in evidence to confirm the witness who had spoken to the general authority.[5]

§ 338. It may, in connexion with the rule that evidence of collateral facts is usually inadmissible, be noted that, where the *knowledge*, *intent*, or *good faith*, of a party is material, evidence

[1] R. *v.* Pearce, 1791, Pea. 75.

[2] R. *v.* Egerton, 1819, R. & R. 375, cited by Holroyd, J., in R. *v.* Ellis, 1826, 6 B. & C. 147.

[3] R. *v.* Briggs, 1839, 2 M. & Rob. 199.

[4] R. *v.* Rooney, 1836, 7 C. & P. 517. See, also, R. *v.* Fursey, 1833, 6 C. & P. 81.

[5] Llewellyn *v.* Winckworth, 1845, 14 L. J. Ex. 329. See Hollingham *v.* Head, 1858, 27 L. J. C. P. 241; Morris *v.* Bethell, 1869, L. R. 4 C. P. 765.

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§§ 338, 339.

may be admitted to prove facts which happened before or after the principal transaction, even when they have no direct or apparent connexion with such transaction. At first sight the admission of such evidence may appear to constitute another exception to the general rule. But the *knowledge* or *good faith*, or *intent* of the party being a material fact, the evidence, though apparently collateral, and foreign to the main subject, really has a direct bearing on an issue in the case. Therefore, the admission of such evidence, instead of being an exception to the rule, falls strictly within it. An example of this principle is that where the question is, whether the acceptor of a bill of exchange either knew that the name of the payee was fictitious, or at any rate had given the drawer a general authority to draw bills on him payable to fictitious persons, evidence may be admitted to show that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date.[1] Again, in an action for an assault and consequent injury, evidence that she had ascribed her injury to a previous accident having been given for the defence, the plaintiff was allowed to show that in fact no such accident had ever occurred.[2] So, too, in any trial, evidence will be admissible to prove or disprove any attempt at subornation of witnesses.[3]

§ 339. Further, in an action for fraudulently representing that a trader was trustworthy, whereby the plaintiff was induced to trust him, the defendant was permitted to call fellow-townsmen of the trader to state that, at the time when the representation was made, the man was, according to their belief, in good credit;[3] in an action for the price of fixing railings to certain houses belonging to defendant, the defence to which was that plaintiff had given credit to a builder by whom the houses were built under a contract, such builder was, to show the bona fides of the defence, allowed to state that the order was given by him on his own account, and not as agent for the defendant, and that the defendant had actually paid him for the building of the houses,

[1] Gibson *v.* Hunter, 1794, 2 H. Bl. 288.

[2] Melhuish *v.* Collier, 1850, 19 L. J. Q. B. 493.

[3] Sheen *v.* Bumstead, 1863, 32 L. J. Ex. 271.

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§§ 339, 340.

including the charge for the railings;[1] and where a person seeks to set aside a contract on the ground of his having been insane when it was made, it must be shown that the defendant was at the time *aware* of the insanity,[2] and, upon this question, evidence of the plaintiff's conduct, at different times, both before and after the date of the contract, is admissible to show that the madness was of such a character as must have been apparent to anyone who had had opportunities of observation like those afforded to the defendant.[3]

§ 340. On the same principle, in an action against a company to recover money paid to them in consequence of a *fraud* alleged to have been committed by their agent, with their knowledge and for their benefit, evidence of similar frauds perpetrated on other persons by the same agent, with the knowledge and for the benefit of the defendants, is admissible in proof of fraudulent complicity in the case before the court;[4] in actions for false representation, where the questions turn on *fraudulent intent*, other mis-statements besides those laid in the statement of claim will be admissible in evidence, for the purpose of showing that the defendant was actuated by dishonest motives;[5] in the Divorce Division, in a suit for dissolution of marriage, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, will be admissible for the purpose of showing the character of previous acts of improper familiarity[6] and, similarly, when evidence of adultery has been given on one of several occasions charged, then evidence may further be given of circumstances from which the court may infer adultery on some or all of the remaining occasions, even though the circumstances amount to no more than opportunity; in actions for malicious arrest, the jury are always at liberty to draw an inference of malice ex antecedentibus et consequentibus;[7] and in actions for defamation, other words written or spoken by the defendant, either before,[8] or after,

[1] Gerish *v.* Chartier, 1845, 14 L. J. C. P. 84.

[2] Imperial Loan Co. *v.* Stone, [1892] 1 Q. B. 599, (C. A.).

[3] Beavan *v.* M'Donnell, 1854, 23 L. J. Ex. 326.

[4] Blake *v.* Albion Life Ass. Co., 1878, 45 L. J. C. P. 663. See ante, § 328.

[5] Huntingford *v.* Massey, 1859, 1 F. & F. 690.

[6] Boddy *v.* Boddy, 1860, 30 L. J. P. & M. 23; Wales *v.* Wales, [1900] P. 63.

[7] Spencer *v.* Thompson, 1855, 6 Ir. C. L. 537, 565.

[8] Long *v.* Barrett, 1845, 7 Ir. L. R. 439; 8 Ir. L. R. 331; Barrett *v.*

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those declared upon, or even after issue joined,[1] are admissible as evidence of *actual malice* or of *deliberate publication*;[2] and this whether the language on which the action is founded be equivocal or clear,[3]—whether the collateral words tendered in evidence be addressed to the same party, to whom the slander is alleged in the statement of claim to have been spoken, or to a stranger,[4]—or whether those words be themselves actionable or not.[5]

§ 341. Again, in an action for false imprisonment, in which the defendant pleaded, first, not guilty, and secondly, a plea (which was abandoned and apologised for at the trial) setting up a justification, and alleging that plaintiff had committed a felony,

Long, 1856, 3 H. L. C. 395. Libels written as much as six years before that sued upon are admissible. The jury should, however, be cautioned not to give damages respecting them: Ib. But the omission to give such caution will not amount to misdirection: Darby *v.* Ouseley, 1856, 25 L. J. Ex. 227. Such other libels are also admissible upon a question as to the *construction* of the alleged libel: Bolton *v.* O'Brien, 1885, 16 L. R. Ir. 97.

[1] Pearson *v.* Le Maitre, 1843, 12 L. J. Q. B. 253. A letter written subsequently to the commencement of the action, and fourteen months after the libel complained of, is admissible: Ib. See, also, Macleod *v.* Wakley, 1828, 3 C. & P. 311, where a paragraph published only two days before the trial was admitted by Ld. Tenterden; and Plunkett *v.* Cobbett, 1804, 5 Esp. 136, where proof that a copy of the paper containing the libel was sold after action brought was admitted by Ld. Ellenborough as evidence of deliberate publication.

[2] Pearson *v.* Le Maitre, 1843, 12 L. J. Q. B. 253: Barwell *v.* Adkins, 1840, 1 M. & Gr. 807; Perkins *v.* Vaughan, 1842, 12 L. J. C. P. 38; Hemmings *v.* Gasson, 1858, 27 L. J. Q. B. 252; Rustell *v.* Macquister, 1809, 1 Camp. 49, n.; Charlter *v.* Barret, 1790, Peake, 32; Lee *v.* Huson, 1791, Peake, 166; Scott *v.* Ld. Oxford, 1808, Peake, 170, n.; Delegal *v.* Highley, 1837, 8 C. & P. 444; Jackson *v.* Adams, 1835, 2 Bing. N. C. 402.

[3] See n. [5], below.

[4] Pearson *v.* Lemaitre, 1843, 12 L. J. Q. B. 253; Mead *v.* Daubigny, 1792, Peake, 125.

[5] Pearson *v.* Lemaitre, 1843, 12 L. J. Q. B. 253, questioning Pearce *v.* Ornsby, 1835, 1 M. & Rob. 455, and Symmons *v.* Blake, 1835, 1 M. & Rob. 477. Tindal, C.J., in pronouncing the judgment of the court, states the correct rule to be, "that either party may, with a view to damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury shall be cautioned against giving any damages in respect of it; and if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of Pearce *v.* Ornsby and Symmons *v.* Blake went no farther than this. . . . Upon principle, we think that the *spirit and intention* of the party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff, and that evidence tending to prove them cannot be excluded, simply because it may disclose another and different cause of action." See, also, Rustell *v.* Macquister, 1809, 1 Camp. 49, n., where Ld. Ellenborough remarked, that the distinction between words actionable and not actionable was not founded on any principle; and Camfield *v.* Bird, 1852, 3 C. & K. 56.

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§§ 341—343. it was held that, in estimating the damages under the first issue, the jury might take into account the fact of a justification having been pleaded, because the placing such a plea on the record was a persisting in the charge, which, under the circumstances, was strong evidence of malice.[1] And if, on the trial of an action for slander, to which the general issue and a justification are pleaded, the plaintiff express his willingness to accept an apology and nominal damages on the plea of justification being withdrawn, but the defendant refuses to abandon such plea, though he offers no evidence in support of its truth, the jury may consider the defendant's conduct, not only with reference to the question of damages, but as furnishing evidence of express malice, and thus rendering the words proved actionable, though they were prima facie privileged communications.[2]

§ 342. If, however, in an action for a libel, the defendant set up the defences of a privileged communication and justification, which latter plea is openly abandoned at the trial, the jury ought not, for the purpose of arriving at their decision on the first plea, to take into consideration the circumstance that the justification was once pleaded, although they may take it into consideration in assessing the damages.[3] And where it clearly appears that other libels are offered in evidence, merely with the view of unfairly recovering damages for the injury sustained by *their* publication, they will properly be rejected;[4]—indeed, no libels subsequent to that which is the subject of the action ought to be admitted, unless they directly refer to the defamatory language set out in the statement of claim, or at least relate to the same subject-matter.[5]

§ 343. Not only is other defamatory matter sometimes admissible for the purpose of showing the animus of the defendant, but

[1] Warwick *v.* Foulkes, 1844, 13 L. J. Ex. 109.

[2] Simpson *v.* Robinson, 1848, 18 L. J. Q. B. 73. A jury should, however, always consider *quo animo* a justification which fails was pleaded, and whether it was put forward bonâ fide as a defence, or only to embrace the opportunity of reiterating the charge. The mere failure to prove a justification is not alone and in itself evidence of malice: Upton *v.* Hume, 1893, 41 Am. St. R. 863.

[3] Wilson *v.* Robinson, 1845, 14 L. J. Q. B. 196.

[4] See cases cited, ante, in notes [5], [1], and [2] to § 340; Stuart *v.* Lovell, 1817, 2 Stark. R. 94; Defries *v.* Davis, 1835, 7 C. & P. 112.

[5] Finnerty *v.* Tipper, 1809, 2 Camp. 72.

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the *mode* in which such matter was published may also be highly material; as, for instance, if printed placards were sent to the plaintiff's house, or paraded before his door.[1]

§ 344. On the other hand, on the principle that evidence of collateral facts is admissible to show *intent*, *malice*, or *good or bad faith*, a defendant has been allowed, in mitigation of damages, to give evidence palliating, though not justifying, his act of publishing a libel. For instance, he may show that he copied it from another newspaper,[2] or that he had been *provoked* to act as he had done by the conduct of the plaintiff, who had previously published libels of him respecting the same subject-matter, which had only recently come to the knowledge of the defendant;[3] for evidence of provocation by libels on the defendant is admissible, not on the ground of any right to set off one libel against another,[4] but from an indulgent consideration of the weakness which sometimes leads an angry man to say "that he should be sorry for." But it is now directed that in actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which

[1] Bond *v.* Douglas, 1836, 7 C. & P. 626.

[2] Upton *v.* Hume, 1893, 41 Am. St. R. 863; Saunders *v.* Mills, 1829, 6 Bing. 213, cited by Tindal, C.J., in Pearson *v.* Le Maitre, 1843, 12 L. J. Q. B. 253. In Talbutt *v.* Clark, 1840, 2 M. & Rob. 312, Ld. Denman would not permit the editor of a newspaper to show, in mitigation of damages, that the libel was published on the communication of a correspondent; and referring to a case, which was probably Saunders *v.* Mills, his lordship observed, that "that decision had been very much questioned." However, by the recognition of Saunders *v.* Mills in Pearson *v.* Le Maitre, Talbutt *v.* Clark would seem to be indirectly overruled. See, also, East *v.* Chapman, 1827, 2 C. & P. 570; Charlton *v.* Watton, 1834, 6 C. & P. 385; Creevy *v.* Carr, 1835, 7 C. & P. 64.

[3] Watts *v.* Fraser, 1837, 7 C. & P. 369; Tarpley *v.* Blabey, 1836, 7 C. & P. 395; May *v.* Brown, 1824, 3 B. & C. 113; Wakley *v.* Johnson, 1826, R. & M. 422; Finnerty *v.* Tipper, 1809, 2 Camp. 72. See Richards *v.* Richards, 1844, 15 East, 294, n. In America the defendant is allowed to give evidence, not only in mitigation of damages in a civil suit, but of punishment in criminal proceedings, that the plaintiff has libelled him previously to the publication by the defendant of the libel complained of. See Decamp *v.* Archibald, 1893, 40 Am. St. R. 622.

[4] Watts *v.* Fraser, 1835, 7 A. & E. 323. In Judge *v.* Berkeley, 1825, 7 C. & P. 371, n., Burrough, J., allowed the defendant, in an action of assault, to prove, in mitigation of damages, a series of libellous articles published respecting him by the plaintiff, one of which appeared on the the day of the assault.

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§§ 344, 345. the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.[1]

§ 345. Evidence as to *animus* or intent is frequently admissible in criminal proceedings, even though it tends to show that the accused has been guilty of criminal acts other than those with which he is charged.[2] For instance, on an indictment for knowingly uttering a forged document, or a counterfeit bank note, or counterfeit coin, proof of the possession, or (by statute) of the prior or subsequent[3] utterance, either to the prosecutor himself or to other persons, of other false documents or notes, or bad money, though the latter be of a different description,[4] or themselves the subjects of separate indictments,[5] is admissible as material to the question of *guilty knowledge* or *intent*.[6] In these cases, however, it is essential to prove distinctly that the instruments offered in evidence of guilty knowledge were themselves forged.[7] Moreover, though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, it seems that he cannot show what the prisoner said or did at another time, with respect to such uttering; for these collateral facts are too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict.[8]

[1] R. S. C. 1883, Ord. XXXVI. r. 37.

[2] Makin *v.* Att.-Gen. for New South Wales, [1894] A. C. 57.

[3] R. *v.* Forster, 1855, Dears. 456. This case disposes of a doubt raised in R. *v.* Taverner, 1809, and in R. *v.* Smith, 1831, 4 C. & P. 411, as to whether evidence of *subsequent* utterings would be admissible, if the notes or coin were of a *different* description.

[4] R. *v.* Harris, 1836, 7 C. & P. 429 (by all the judges); R. *v.* Forster, 1855, Dears. 456. Doubts had been entertained on this subject by some of the judges in R. *v.* Millard, 1813, R. & R. 245, but the evidence was admitted in Sunderland's, Hodgson's, Kirkwood's, and Martin's cases, 1830, 1 Lewin, C. C. 102—104. The same evidence is admissible in Scotland: Alison, Cr. L. 420.

[5] R. *v.* Hough, 1806, R. & R. 122; R. *v.* Weeks, 1861, 30 L. J. M. C. 141; Kirkwood's case, 1830, 1 Lewin, C. C. 103; Martin's case, 1814, 1 Lewin, C. C. 104; R. *v.* Aston, 1838, 2 Russ. C. & M. 732; R. *v.* Lewis, 1840, Arch. Cr. Pl. 651. Contrà, R. *v.* Smith, 1827, 2 C. & P. 633.

[6] R. *v.* Wylie, 1804, 1 Bos. & P. N. R. 94; R. *v.* Ball, 1807, 1 Camp. 324; R. *v.* Harrison, 1834, 2 Lewin, C. C. 118; R. *v.* Green, 1852, 3 C. & K. 209; R. *v.* Nisbett, 1853, 6 Cox, C. C. 320; R. *v.* Salt, 1862, 3 F. & F. 834; R. *v.* Colclough, 1882, 10 L. R. Ir. 241.

[7] R. *v.* Millard, 1813, R. & R. 245.

[8] R. *v.* Phillips, 1829, 1 Lewin, C. C. 105; R. *v.* Cooke, 1838, 8 C. &

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§§ 346, 347.

§ 346. Evidence of this description has constantly been admitted on indictments for false pretences for the purpose of showing a systematic course of conduct in the prisoner, and of negativing accident or mistake or the existence of any reasonable or honest motive on his part;[1] and this, even although the prisoner may have been previously indicted and acquitted in respect of the acts of which evidence is tendered,[2] and although the acts may have occurred subsequent to the offence charged in the indictment.[3] It has now been expressly rendered by the Legislature also admissible against receivers of stolen goods; the Prevention of Crimes Act, 1871,[4] enacting, that, "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found[5] in the possession of such person other property within the preceding period of twelve months,[6] and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him."

§ 347. This doctrine has been acted upon in many cases other than those previously mentioned, thus, on a charge of sending a threatening letter, other letters written by the prisoner, both before and after the one in question, have been admitted to explain its meaning;[7] on an indictment for malicious shooting, if it be doubtful whether the shot was fired by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person;[8] and on indictments for

P. 582. Contrà, R. *v.* Forbes, 1835, 7 C. & P. 224. See R. *v.* Brown, 1816, 2 F. & F. 559.

[1] R. *v.* Wyatt, [1903], [1904] 1 K. B. 188; R. *v.* Smith, [1905] 92 L. T. 208; R. *v.* Roebuck, 1855, Dears. & B. 24; R. *v.* Francis, 1874, L. R. 2 C. C. 128.

[2] R. *v.* Ollis, [1900] 2 Q. B. 758.

[3] R. *v.* Rhodes, [1899] 1 Q. B. 77.

[4] 34 & 35 V. c. 112, § 19.

[5] It is not sufficient under these words to prove that the prisoner had very recently *dealt with* other stolen property: R. *v.* Drage, 1875, 14 Cox, C. C. 85; R. *v.* Carter, 1884, 12 Q. B. D. 522 (C. C. R.).

[6] This evidence will be admissible, though the property so found may be the subject of another indictment against the prisoner at the same assizes: R. *v.* Jones, 1877, 14 Cox, C. C. 3.

[7] R. *v.* Robinson, 1796, 2 Leach, C. C. 755, 765.

[8] R. *v.* Voke, 1823, R. & R. 531. For other examples, see R. *v.* Mogg, 1830, 4 C. & P. 364; R. *v.* Dossett, 1846, 2 C. & K. 306; R. *v.* Richardson, 1860, 2 F. & F. 343; R. *v.* Harris, 1864, 4 F. & F. 342. See, also, ante, §§ 327, 328.

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§§ 347—350. murder, evidence of former menaces or quarrels will have an important tendency towards supporting the legal inference of malice,[1] while proof of expressions of kindness or of friendly acts towards the deceased will be entitled to equal weight as raising a counter presumption.[2]

§ 348. On an indictment for a robbery, where the prisoners formed part of a mob who went into the prosecutor's house, one of which mob had civilly advised prosecutor to give it something to prevent mischief, evidence that the same mob, in the presence of some of the prisoners, had demanded money at other houses on the same day, was admitted, as tending to prove that the advice was not given bonâ fide, but was in reality a polite mode of committing a robbery.[3] On this last case the acts given in evidence were not committed by the prisoners themselves, but only by some of the mob with whom they were connected. But the principle is the same, the law being, that where several evil-doers conspire together to effect some unlawful purpose, acts done by any one of the party in furtherance of the common design shall be considered as done by all.[4]

§ 349. On this rule, that collateral facts are admissible to show *animus* or *intent*, rests the admissibility of evidence as to the *general character* of individuals. Such evidence is tendered for the purpose of either raising a *presumption* of innocence or guilt, or of affecting the *amount of damages*, or of impeaching or supporting the *veracity* of a witness;[5] the first object being chiefly confined to criminal prosecutions, and the second to civil causes, while the third is equally applicable to both forms of procedure.

§ 350. The term "character," as here used, is not—as some

[1] See R. *v.* Hagan, 1873, 12 Cox, C. C. 357.

[2] 1 Ph. Ev. 470, 476. For other instances where evidence of this nature has, or has not been admitted, see R. *v.* Fairie, 1857, 8 E. & B. 486; R. *v.* Winslow, 1860, 8 Cox, C. C. 397; R. *v.* Giering, 1849, 18 L. J. M. C. 215; R. *v.* Oddy, 2 Den. 264; R. *v.* Sirrell, 1850, cited 2 Den. 267; R. *v.* Dunn, 1826, 1 Moo. C. C. 146; R. *v.* Nicholls, 1838, 1 F. & F. 51.

[3] R. *v.* Winkworth, 1830, 4 C. & P. 444 (Parke, J., with the concurrence of Ld. Tenterden, Alderson, J., and Vaughan, B.). This doctrine forms an incident in Mr. Baring Gould's Novel "Cheap Jack Zita."

[4] R. *v.* Watson, 1817, 2 Stark. R. 139; R. *v.* Hardy, 1794, 24 How. St. Tr. 704; R. *v.* Salter, 1804, 5 Esp. 125; R. *v.* Hunt, 1820, 3 B. & Ald. 566.

[5] 2 St. Ev. 303.

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§§ 350, 351.

able judges have considered it to be[1]—synonymous with "disposition," but it simply means "reputation," or the general credit which a man has obtained in public opinion.[2] The position of a witness who is called to speak to character is exactly the opposite of that of a master who is asked for the character of his servant. The master must give his servant the character which his own personal experience has told him that the servant deserves. But a witness to character cannot give the result of his own personal experience and observation, or express his own opinion, but must, in strict law, confine himself to evidence of mere general repute.[3] This rule rests rather on authority than on reason, and would probably have been long ago discarded but for two causes. First, the rule, in practice, is seldom strictly enforced; and next, as "the best character is generally that which is the least talked about,"[4] the judges *have modified* it, to a certain extent, by permitting witnesses to give negative evidence on the subject, and state that "they never heard anything *against* the character of the person on whose behalf they have been called."[5]

§ 351. When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and, therefore, in this latter event alone will the jury be advised to act upon such evidence.[6] The inquiry, too, must be confined,—except where the *intention* forms a material ingredient in the offence.[7]—to the *general* character of the prisoner, and must not condescend to *particular* facts.[8] For although the common reputation, in which a person is held in society, may be undeserved, and the

[1] R. *v.* Rowton, 1865, 34 L. J. M. C. 57.

[2] Id.

[3] Id. See post, § 1470.

[4] Per Erle, C.J., 1865. Some judges, indeed, have asserted that evidence in this negative form is the most cogent proof of a man's good reputation. Id.

[5] Per Cockburn, C.J., 1865.

[6] In R. *v.* Turner, 1664, 6 How. St. Tr. 613, Hyde, C.J., observed to the jury:—"The witnesses called in point of reputation I must leave to you. Few men that come to be questioned but shall have some come and say, 'he is a very honest man; I never knew any hurt by him;' but is this *anything against the evidence of the fact?*"

[7] Ante, § 345.

[8] J'Anson *v.* Stuart, 1796, 1 T. R. 754. In former times the practice was less strict. See R. *v.* Turner, 1664, 6 How. St. Tr. 613.

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§§ 351, 352.

evidence in support of it must, from its very nature, be indefinite, yet some inference, varying in degree according to circumstances, may fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. The mere proof of isolated facts can, however, afford no such presumption. "None are all evil," and the most consummate villain may be able to prove that on *some* occasions he has acted with humanity, fairness, or honour. In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him:[1] as, for instance, if he be accused of theft, that he has been reputed an honest man;—if of treason, a man of loyalty. It should also relate to the same period as the supposed offence; for, as Lord Holt once remarked, "A man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one."[2] Subject to these observations, evidence of the defendant's general good character is admissible in all prosecutions whether for felony or misdemeanor.[3]

§ 352. Although a defendant is, from motives of humanity, allowed this reasonable indulgence, the prosecutor cannot, in the first instance, have recourse to similar loose testimony for the purpose of establishing the guilt of the accused.[4] If, however, with the view of raising a presumption of innocence, witnesses to character are called for the defence, counsel for the Crown may then not only cross-examine such witnesses to rebut this presumption, either as to particular facts,[5] or, if it be deemed essential, as to the grounds of their belief,[6] but evidence of general bad character will also be admissible,[7]—though the right of

[1] Douglass *v.* Tousey, 1829, 2 Wend 352 (Am.).

[2] R. *v.* Swendsen, 1702, 14 How. St. Tr. 496.

[3] 2 Russ. C. & M. 784.

[4] R. *v.* Tuberfield, 1864, 30 L. J. M. C. 20. In that case the question was put, not to prove the guilt of the prisoner, but to show that the witness, a policeman, had had probable cause for arresting him. Held, nevertheless, that the answer was not evidence.

[5] R. *v.* Hodgkiss, 1836, 7 C. & P. 298. In R. *v.* Wood, 1860, 5 Jur. 225, Parke, B., allowed a witness to character to be asked, in cross-examination, whether he had not heard that the prisoner was *suspected* of having committed a robbery some years before. See, also, R. *v.* Turner, 1664, 6 How. St. Tr. 613.

[6] 2 St. Ev. 304.

[7] R. *v.* Rowton, 1865, 34 L. J.

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counsel for the Crown in this respect is in practice seldom resorted to.[1] When a person charged with an offence is called as a witness in his own defence, in pursuance of the Criminal Evidence Act, 1898, he can only be cross-examined as to character, subject to the provisions set out in the Act.[2] Moreover, in most trials for felony, and in some for misdemeanor, if defendant endeavour to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution,[3] the prosecution have a right—which is usually exercised—to, in answer, prove the specific fact that the prisoner has actually been convicted previously. The statutes authorizing this, however, do not extend to any *capital* felonies, and apply only partially to misdemeanors.[4]

§ 353. Moreover, the Prevention of Crimes Act, 1871,[5] in addition to the provisions which have been already[6] set out, provides[7] that "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to

M. C. 57, by all the judges, overruling R. *v.* Burt, 1851, 5 Cox, C. C. 284.

[1] 2 St. Ev. 304.

[2] As to which, see, ante, § 326, n.

[3] R. *v.* Shrimpton, 1851, 21 L. J. M. C. 37; R. *v.* Gadbury, 1838, 8 C. & P. 676.

[4] See, as allowing this, 6 & 7 W. 4, c. 111, as to *any felony not punishable with death* after conviction for felony; as to offences punishable under that Act, 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 116; see also, as to offences against the coin, 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 37; R. *v.* Martin, 1869, L. R. 1 C. C. R. 214; and as to any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 58. See, also, "The Prevention of Crimes Act, 1871" (34 & 35 V. c. 112), §§ 9, 20.

[5] 34 & 35 V. c. 112.

[6] Ante, § 346.

[7] In § 19.

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§§ 353, 354.

be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused."[1] On the trial of an indictment under § 7 of the Prevention of Crimes Act, 1871 (which relates to special offences by persons twice convicted of crimes), the previous convictions being a necessary ingredient of the offence, may be given in evidence before the jury in the first instance.[2]

§ 354. The admission of evidence of general character is only allowed in criminal proceedings, where it was originally received, some two centuries ago,[3] in favorem vitæ. So strict is this rule, that even upon an information for penalties filed in the Revenue side of the Queen's Bench Division by the Attorney-General, such evidence will be rejected, because proceedings of this kind, though brought in the name of the Sovereign, are considered as civil suits.[4] Evidence of general good character or competency is not admissible either in an action of ejectment by an heir-at-law against a devisee, where defendant was charged with having imposed a fictitious will on the testator in extremis;[5] in an action for slander—even where, by pleading the truth of words charging the plaintiff with stealing money, the latter had put the character of the former directly in jeopardy;[6] in an action for malicious prosecution,[7] in support of probable cause; in an action

[1] R. *v.* Davis, 1870, L. R. 1 C. C. R. 272.

[2] R. *v.* Penfold, [1902] 1 K. B. 547.

[3] So early as 1664, the practice of calling "witnesses in point of reputation" was well established. See Hyde, C.J., in R. *v.* Turner, 1664, 6 How. St. Tr. 613. Accordingly, in 1680, such evidence was received even by Scroggs, C.J., with Jefferies as prosecuting counsel: R. *v.* Harris, 1680, 7 How. St. Tr. 926, 929.

[4] Att.-Gen. *v.* Bowman, 1791, 2 B. & P. 532, n. (Eyre, C.B.). His lordship observed, that, "the true line of distinction is this: in a direct prosecution for a crime, such evidence is admissible; but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not." See Att.-Gen. *v.* Radloff, 1854, 23 L. J. Ex. 240.

[5] Doe *v.* Hicks, cited by Gibbs, arguendo, in Doe *v.* Walker, 1801, 4 Esp. 50.

[6] Cornwall *v.* Richardson, 1825, Ry. & M. 305.

[7] Newsam *v.* Carr, 1817, 2 Stark. R. 69; Gregory *v.* Thomas, 1811, 2 Bibb. 286; contrà, Rodriquez *v.* Tadmire, 1799, 2 Esp. 721. In America, this kind of evidence has been also rejected in actions of assault and battery; Givens *v.* Bradley, 1813, 3 Bibb. 192 (Am.); and in assumpsit, Nash *v.* Gilkeson, 1819, 5 Serg. & R. 352; and is inadmissible whenever the general character is involved by the plea only, and not by the nature of the action; Anderson *v.* Long, 1823, 10 Serg. & R. 55 (Am.); Potter *v.* Webb, 1829, 6 Greenl. 44 (Am.) See Gr. Ev. § 55.

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of trespass for false imprisonment on a criminal charge, in which the defendant must not even cross examine, either as to the plaintiff's bad character, or as to previous charges made against him;[1] nor in an action for a libel charging a professional man with want of skill in some particular work—and this even though the evidence be offered with a view of showing that the defendant, in making the charge, was actuated by malice.[2]

§ 355. A distinction, however, exists between cases where *particular* acts of misconduct are imputed to a party, and those where his *general* conduct is put in issue. For general evidence of character, though rejected in the former, is admitted in the latter class of cases.[3] Thus, in an action for a libel, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good tempered," general evidence of her competency, good temper, and manners, was given by her personal friends;[4] and where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had formerly lived, was allowed to testify to her antecedent general good conduct.[5] These cases are, however, in truth, no exception to the rule of exclusion.[6]

§ 356. General evidence of character is (subject to compliance with the rule as to previous notice in actions for libel or slander, which has been set out while considering the subject of evidence of libellous attacks upon a defendant being received in mitigation of damages[7]) admissible, not only upon questions of *malice*, intent, and so on, but also for the purpose of increasing or diminishing *damages*. For example, evidence impeaching the

[1] Downing *v.* Butcher, 1841, 2 M. & Rob. 374; Jones *v.* Stevens, 1822, 11 Price, 235.

[2] Brine *v.* Bazalgette, 1849, 18 L. J. Ex. 348.

[3] Doe *v.* Hicks, undated, as cited by Gibbs, arguendo, in Doe *v.* Walker, 1801, 4 Esp. 50.

[4] Fountain *v.* Boodle, 1842, 3 Q. B. 5. See Brine *v.* Bazalgette, 1849, 18 L. J. Ex. 348.

[5] King *v.* Waring, 1803, 5 Esp. 14 (Ld. Alvanley).

[6] For just as in cumulative offences, such as treason, or a conspiracy to carry on the business of common cheats, many acts are given in evidence, because such crimes can be proved in no other way: R. *v.* Roberts, 1808, 1 Camp. 399, so where the general behaviour of a party is impeached, it is only by general evidence that such charge can be rebutted.

[7] See Ord. XXXVI. r. 37, ante, § 344; see, also § 349.

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§§ 356, 357.

previous general character as to chastity of the seduced wife or daughter is admissible on a petition claiming damages on the ground of adultery,[1] or in an action for seduction.[2] For in these proceedings the plaintiff in reality (though in actions for seduction it is not the ostensible ground of claim[3]) seeks compensation for the pain caused him, by the disgrace of his family, and the ruin of his domestic happiness; and the damages should be commensurate with the pain, and vary according as the character of the seduced wife or daughter was previously unblemished or profligate. Therefore, in such cases, not only is evidence of general bad character admissible in mitigation of damages, but even particular acts of immorality or indecorum may be proved.[4]

§ 357. Both evidence of acts of this description, as well as proof of general bad character, must, however, be confined to occurrences *previously* to the defendant's misconduct, because this very misconduct may, by weakening the principles of the woman, have been the indirect cause of subsequent immorality, and may have itself occasioned a general want of reputation.[5] Where in an action for seduction the daughter, in her examination in chief, states that the defendant seduced her, and that she has borne a child in consequence, and the defence is that she has declared another person to be the father, witnesses cannot be called to prove her declarations, unless she be first cross-examined as to the fact of her having made them; because, though language of this kind, if lightly uttered, would tend to degrade her character, yet, if used in earnest, it would directly contradict the testimony she had given, and would be evidence not in mitigation of damages, but in bar of the action.[6]

[1] 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

[2] B. N. P. 27, 296; Elsam *v.* Faucett, 1797, 2 Esp. 563.

[3] See Dodd *v.* Norris, 1814, 3 Camp. 520; Andrews *v.* Askey, 1837, 8 C. & P. 7. See, also, cases cited in n. *a*, to S. C.; Grinnell *v.* Wells, 1844, 40 L. J. C. P. 19; Thompson *v.* Ross, 1858, 29 L. J. Ex. 1; Long *v.* Keightley 1877, Ir. R. 11 Cl. 221 (Ir.); Rist *v.* Faux, 1863, 32 L. J. Q. B. 386; Terry *v.* Hutchinson, 1868, L. R. 3 Q. B. 599; Hedges *v.* Tagg, 1872, L. R. 7 Ex. 283.

[4] Verry *v.* Watkins, 1836, 7 C. & P. 308. See, also, Simpson *v.* Grayson, 1892, 26 Am. St. R. 52.

[5] Elsam *v.* Faucett, 1797, 2 Esp. 563.

[6] Carpenter *v.* Wall, 1840, 3 P. & D. 457; Andrews *v.* Askey, 1837, 8 C. & P. 7.

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§ 358. On a claim of damages from an alleged adulterer,[1] the co-respondent may prove, in mitigation of damages, that the petitioner has been guilty of notorious infidelity; has turned his wife out of doors; has refused to maintain her; or has otherwise been guilty of dissolute conduct;[2] for, in such cases, a man can scarcely complain of the loss of that society upon which he has himself placed so little value. In an action for seduction, it would on principle appear that evidence in mitigation of damages may be given (since plaintiff conduced to the result by allowing his daughter to consort with such a person) to show that the defendant is notoriously a man of profligate habits. In actions for breach of promise, the defendant is entitled to prove, in mitigation of damages, that the plaintiff is a person, either of bad character,[3] or of coarse and brutal manners,[4] though acts of misconduct committed *after* the promise, or even *before* that event *without the knowledge* of the defendant,[5] can, where sufficiently glaring to constitute a bar to the action,[6] only be proved under a special defence.[7]

§ 359. It has been much discussed, and is not now clear, whether, in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages.[8] It

[1] See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

[2] B. N. P. 27; Bromley *v.* Wallace, 1803, 4 Esp. 237.

[3] Foulkes *v.* Sellway, 1800, 3 Esp. 236. See, also, Johnson *v.* Caulkins, 1799, 1 Johns. 116 (Am.); Boynton *v.* Kellogg, 1807, 3 Mass. 189 (Am.).

[4] Leeds *v.* Cook, 1803) 4 Esp. 258.

[5] Irving *v.* Greenwood, 1824, 1 C. & P. 350.

[6] Leeds *v.* Cook, 1803, 4 Esp. 258; Baddeley *v.* Mortlock, 1816, Holt, N. P. 151.

[7] Ante, § 301. See Young *v.* Murphy, 1836, 6 L. J. C. P. 180; and Pujolas *v.* Holland, 1841, Ir. Cir. R. 19 (Ir.).

[8] See, in support of the admissibility of the evidence, Richards *v.* Richards, 1844, 2 M. & Rob. 557; —— *v.* Moor, 1813, 1 M. & Selw. 284; Ld. Leicester *v.* Walter, 1809, 2 Camp. 251; Bell *v.* Parke, 1860, 11 Ir. C. L. R. 413; Williams *v.* Callender, 1810, Holt, N. P. 307; Eamer *v.* Merle, 1802-9, 2 Camp. 253; Knobell *v.* Fuller, 1797, Peake, Add. Cas. 139; Newsam *v.* Carr, 1817, 2 Stark. R. 70; Ellershaw *v.* Robinson, 1816-28; Moore *v.* Oastler, 1836 (Ld. Denman, after consulting Parke, B.); Mawby *v.* Barber, 1826 (Ld. Tenterden); Hardy *v.* Alexander, 1837 (Coltman, J.). These last four cases are cited in 2 St. Ev. 641, 642, n.*e.*; *Acc.* Kirkman *v.* Oxley, 1811-16, 2 Stark. W. 306, n. (Heath, J.). See contrâ, Scott *v.* Sampson, 1882, 8 Q. B. D. 491; Jones *v.* Stevens, 1822, 11 Price, 235; Waithman *v.* Weaver, 1822, 11 Price, 257; Cornwall *v.*

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§§ 359—361.

seems to be, however, now clear that evidence may be given to show that the plaintiff had, before the publication, a general bad character, without reference to whether or no report has credited him with having committed the particular offence laid to his door by the defendant. In the words of Manisty, J., in Wood *v.* Earl of Durham[1]: "In every case of slander or libel the defendant, without justifying that the words published were true in substance and in fact, may say that whether they were or not, the plaintiff had a bad reputation." See also the summing up to the jury of Coleridge, L.C.J., in Woods *v.* Cox,[2] where he approves of the decision in Scott *v.* Sampson, and points out that, in accordance therewith, he has admitted the evidence in question.

§ 360. A defendant, however, in libel or slander, who has not pleaded truth as a justification, is now precluded, by a Rule of Court already set out, from attempting to mitigate damages by giving evidence reflecting on the plaintiff's character, unless he has complied with such Rule.[3]

§ 361. In the above cases, as well as in other actions for libel, and other actions where witnesses to character are admitted, the evidence impeaching the plaintiff's previous general character must (if admissible) be confined to the particular trait in it which is attacked in the alleged libel. Such evidence must, moreover, be confined to the *general reputation* as to plaintiff's character on this point, and it must not relate to particular *acts* of bad *conduct*.[4] Evidence of any rumours calculated to compromise the plaintiff's character must, too, be strictly confined to rumours which were prevalent *before* the publication of the slander of the defendant; otherwise a man might slander another, and then

Richardson, 1825, Ry. & M. 305; Snowdon *v.* Smith, 1811, 1 M. & Selw. 286. In Scotland the evidence is admissible: Dickson, Ev. (Sc.) § 24, and cases there cited in n. (*d*). For the American authorities, see Root *v.* King, 1827, 7 Cowen, 613 (Am.); Bailey *v.* Hyde, 1820, 3 Conn. 463 (Am.); Bennett *v.* Hyde, 1825, 6 Conn. 24 (Am.); Douglass *v.* Tousey, 1829, 2 Wend. 352 (Am.); Inman *v.* Foster, 1832, 8 Wend. 602 (Am.); Walcott *v.* Hall, 1810, 6 Mass. 514 (Am.); Ross *v.* Lapham, 1817, 4 Mass. 275 (Am.); Foot *v.* Tracy, 1806, 1 Johns. 45 (Am.).

[1] 1888, 21 Q. B. D. at p. 505.

[2] 1888, 4 T. L. R. at p. 655.

[3] R. S. C. 1883, Ord. XXXVI. r. 37, cited ante, § 344, ad fin.

[4] See cases cited in last note but one, and further, Andrews *v.* Vanduzer, 1814, 11 Johns. 38 (Am.); Sawyer *v.* Eifert, 1820, 2 Nott. & M'C. 511 (Am.). In actions to recover damage for words spoken and published which impute unchastity or adultery to any woman or girl, no proof of special damage need now be given (54 & 55 Vict. c. 51).

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call neighbours to say that they had heard of the imputations which he had himself originated.[1]

§ 362. A plaintiff cannot give evidence of *general good character in aggravation of damages*, unless counter-proof has been first offered by the defendant; for, until the contrary appear, the presumption of law is already in his favour. Therefore, in an action of slander for imputing theft, plaintiff will not be allowed to prove his character for honesty, even though the defendant has placed on the record pleas of justification.[2] Indeed, in an action for seduction, where evidence was produced for the defence, to prove that the girl had previously had a child by another man, she was not allowed to be asked respecting her general good character for chastity, but plaintiff was restricted to proof that the specific charge made by the defendant was false;[3] on another occasion similar evidence was rejected where the daughter had been cross-examined, with a view of showing that she had been guilty of gross levity and indelicacy;[4] and in a case for criminal conversation, in which the defendant had endeavoured, by cross-examining the plaintiff's witnesses, to impeach plaintiff's character, but had failed, plaintiff was not permitted to call witnesses to his general good conduct.[5] It is true that in these cases the characters attacked remained, in strictness, unimpeached, because the facts insinuated had, or might have, been denied; but, the very circumstance of the questions being asked was calculated to excite a suspicion in the minds of the jury, which, it may be said, the plaintiff should be given an opportunity of removing.[6] A contrary rule has prevailed in a later English case,[7] subsequently followed in Ireland.[8]

§ 363. The law as to the admission of general evidence of character to *impeach the veracity of a witness* will be discussed

[1] Thompson *v.* Nye, 1850, 20 L. J. Q. B. 85; Bell *v.* Parke, 1860, 11 Ir. C. L. R. 413.

[2] Cornwall *v.* Richardson, 1825, Ry. & M. 305.

[3] Bamfield *v.* Massey, 1808, 1 Camp. 460.

[4] Dodd *v.* Norris, 1814, 3 Camp. 520.

[5] King *v.* Francis, 1800, 3 Esp. 116.

[6] C. & P. 100, n. *a*; 2 St. Ev. 306, 307.

[7] Bate *v.* Hill, 1823, 1 C. & P. 100; Murgatroyd *v.* Murgatroyd, 1828, 2 Stark. Ev. 307. See, also, R. *v.* Clarke, 1817, 2 Stark. R. 241.

[8] In Brown *v.* Goodwin (Ir.), 1841, Ir. Cir. R. 61, an action for seduction, in which plaintiff's daughter having been asked questions to impeach her reputation, plaintiff was allowed to call witnesses to her general good character.

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§ 363. hereafter.[1] Such evidence is, however, sometimes receivable, not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. Thus, on indictments for rape, or attempts to commit that crime, not only is evidence of general bad character admissible to show that the prosecutrix ought not to be believed upon her oath, but so also is proof that she is a reputed prostitute, for it goes far towards raising an inference that she yielded willingly. In such cases general evidence of this kind will on this ground be received, though the woman be not called as a witness, and though, if called, she be not asked, on cross-examination, any questions tending to impeach her character for chastity.[2] Counsel for the defence cannot, however, prove *specific* immoral acts with the prisoner, unless he has first given the prosecutrix an opportunity of denying or explaining them.[3] Moreover, the prosecutrix, if cross-examined as to particular acts of immorality with other men, may decline to answer such questions, while, if she answers them in the negative, witnesses cannot be called to contradict her.[4]

[1] Post, §§ 1470—1473.

[2] R. *v.* Clarke, 1817, 2 Stark, R. 241; R. *v.* Clure, 1841, Ir. Cir. R. 275 (Crampton, J.).

[3] R. *v.* Cockcroft, 1870, 11 Cox, C. C. 410. See R. *v.* Martin, 1834, 6 C. & P. 562; R. *v.* Robins, 1843, 2 M. & Rob. 512; R. *v.* Aspinall, 1827, 3 Stark. Ev. 952. On one occasion the prisoner's counsel was allowed to ask the prosecutrix, with the *view of contradicting her*, whether she had not, on a day since the alleged rape, been walking in a certain street with a common prostitute, looking out for men: R. *v.* Barker, 1829, 3 C. & P. 589 (Park, J., after consulting Parke, J.); see, also, Verry *v.* Watkins, 1856, 7 C. & P. 308; Andrews *v.* Askey, 1837, 8 C. & P. 7; and R. *v.* Dean, 1852, 6 Cox, C. C. 23.

[4] R. *v.* Cockcroft, 1870, 11 Cox, C. C. 410; R. *v.* Holmes and Furness, 1871, L. R. 1 C. C. 334; overruling R. *v.* Robins, 1843, 2 M. & Rob. 512; R. *v.* Hodgson, 1812, R. & R. 211; secus, as to acts with prisoner himself, post, § 1441.

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CHAPTER III.

BURTHEN OF PROOF.

§§ 364, 365.

§ 364.[1] THE third of the rules[2] governing the production of evidence is, that *the burthen of proof lies on the party who substantially asserts the affirmative of the issue.* This rule is in the Roman law thus expressed, *Ei incumbit probatio, qui dicit, non qui negat.*[3] It has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable;[4] and also since it is but reasonable and just that the suitor who relies upon the existence of a fact should prove his own case. In its application, regard must be had to the substance and effect of the issue, and not to its grammatical form; for in many cases a party, by making a slight alteration in his pleadings, can give the issue a negative or affirmative form at his pleasure.[5]

§ 365. The best *tests* for ascertaining on whom the burthen of proof lies are, to consider first which party would succeed if no evidence were given on either side;[6] and secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued.[7] Instances in which, on these grounds, averments negative in form must be, nevertheless, proved by the party who asserts such negative, arise in an action for non-compliance with the covenants in a lease, where the

[1] Gr. Ev. § 74 in part.
[2] See ante, § 217.
[3] Dig. Lib. 22, tit. 3, 1, 2; Masc. de Prob. Concl. 70, tot.; Concl. 1128, n. 10. See Tait, Ev. 1.
[4] Dranquet *v.* Prudhomme, 1831, 3 Louis. 83, 86 (Am.).
[5] Soward *v.* Leggatt, 1836, 7 C. & P. 615.
[6] Amos *v.* Hughes, 1835, 1 M. & Rob. 464; Belcher *v.* M'Intosh, 1839, 8 C. & P. 721; Doe *v.* Rowlands, 1840, 9 C. & P. 721; Osborn *v.* Thompson, 1839, 2 M. & Rob. 256; Ridgway *v.* Ewbank, 1839, 2 M. & Rob. 218; Geach *v.* Ingall, 15 L. J. Ex. 37.
[7] Mills *v.* Barber, 1836, 1 M. & W. 427.

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§§ 365, 366.

breach assigned is that the premises were *not* kept in repair, for this allegation must, if traversed, be proved by plaintiff;[1] and in an action where a plaintiff, claiming on a life policy, avers that the insurance was effected on an assertion, made by the insurer, that the insured was not subject to habits or to attacks of illness tending to shorten life, and was in good health, which was true; but the defence is that such statement was false in these respects, namely, that the insured was subject to habits and to attacks tending to shorten life, that is, to habits of intemperance and to attacks of erysipelas, and was ill at the time when the assertion was made, in which case the burthen of proof here again lies upon the plaintiff—since, to entitle him to a verdict, some evidence must be given that the life was insurable at the time when the policy was effected.[2]

§ 366. Similarly, the burthen of proof lies upon the plaintiff in an action for *not* executing a contract in a workmanlike manner, to which it is pleaded that the work was properly done;[3] in an action on a warranty of a horse, where plaintiff alleges that the horse was *not* sound as warranted, and the defendant denies the unsoundness;[4] in an action against a solicitor for *not* using due diligence;[5] against a merchant for *not* loading a sufficient cargo on board a ship, pursuant to a charter-party;[6] against an architect for *not* building houses according to a specification;[7] and, indeed, in every case in which plaintiff grounds his right of action upon a negative allegation, and the establishment of this negative is consequently an essential element in support of his claim.[8] The practice in Admiralty is also in accordance with these principles. In a damage suit there, if a defendant,

[1] Soward *v.* Leggatt, 1836, 7 C. & P. 615; Doe *v.* Rowlands, 1840, 9 C. & P. 734; Belcher *v.* M'Intosh, 1839, 8 C. & P. 721.

[2] Huckman *v.* Firnie, 1838, 7 L. J. Ex. 163; Ashby *v.* Bates, 1846, 15 M. & W. 589; Geach *v.* Ingall, 1845, 15 L. J. Ex. 37; Rawlings *v.* Desborough, 1837, 2 M. & Rob. 328; Craig *v.* Fenn, 1841, C. & Marsh. 43; Pole *v.* Rogers, 1840, 2 M. & Rob. 287.

[3] Amos *v.* Hughes, 1835, 1 M. & Rob. 464.

[4] Osborn *v.* Thompson, 1839, 9 C. & P. 337; Cox *v.* Walker, cited 9 C. & P. 339; S. P. (Tindal, C.J.). In Fisher *v.* Joyce, 1839, cited 9 C. & P. 338, Coleridge, J., allowed defendant to begin, but in Doe *v.* Rowlands, 1840, 9 C. & P. 734, confessed this wrong.

[5] Sherlock *v.* Passman, 1836, 7 C. & P. 292.

[6] Ridgway *v.* Ewbank, 1839, 2 M. & Rob. 218.

[7] Smith *v.* Davies, 1836, 7 C. & P. 307.

[8] Doe *v.* Johnson, 1844, 14 L. J. C. P. 17.

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making no charge of negligence against plaintiff, *denies his averments*, and pleads inevitable accident, plaintiff must begin at the trial.[1] But if, *on the admitted facts*, the onus of proving that there was *no* negligence by him is upon the defendant, he begins.[2]

§ 367. There are certain exceptions to this general rule that the burthen of proof rests on the party whose assertion, though in form negative, is in substance affirmative. These must now be noticed. The first exception to such rule is that the party who asserts the negative must begin whenever there is a *disputable presumption of law* in favour of an affirmative allegation.[3] The presumption, till displaced by direct evidence, serves the party, in whose favour it arises, as well as if he had given express proof. Thus, for instance, where a shipper was charged in a civil action with having shipped dangerously combustible goods without giving notice of their nature, whereby the ship was burnt, as the omission to give notice would have been criminal on the part of the defendant, the law was held to presume that notice had been given, and to thus throw upon the plaintiff the burthen of proving the negative;[4] in an action by a landlord against a tenant for forfeiture by breach of a covenant to insure, it was held that the law presumed, in favour of the party in possession, that he had satisfied the covenant, and that the non-insurance must therefore be proved by the plaintiff,[5] and that the landlord could, to relieve himself from the burthen of giving this negative proof, have inserted an express clause to that effect in the lease;[6] in an action on an insurance on a ship, if the underwriter plead that certain material facts, known to the assured, had been concealed from him, the burthen of proving the non-communication of these facts will, on a reply traversing this the whole statement

[1] The Benmore, 1873, L. R. 4 Adm. & Ecc. 132; The Otter, 1874, L. R. 4 Adm. & Ecc. 203.

[2] The Merchant Prince, [1892] P. 9, 179.

[3] It is only with reference to disputable presumptions of law that this rule applies, for if the presumption be conclusive, no evidence at all can be given to rebut it; if it be merely one of fact, the presumption itself does not arise till made by a jury. See ante, §§ 71, 109, 214—216.

[4] Williams *v.* E. India Co., 1802, 3 East, 192, 201.

[5] See Toleman *v.* Portbury, 1869, L. R. 5 Q. B. 288 (Ex. Ch.).

[6] Doe *v.* Whitehead, 1838, 8 A. & E. 571, where refusal to produce the policy or any receipt for premium was held not sufficient proof of an omission to insure.

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§§ 367—369. of defence, be on the defendant; for the presumption of law primâ facie is that the assured discharged his duty of communicating all material facts to the underwriter—though the amount of evidence required to show the contrary will vary according to circumstances. Indeed, *sometimes* very slender evidence will be sufficient, so that, for instance, proof that a ship was known by the assured to have been burnt at the time when the assurance was effected would in itself be reasonable evidence to show that it had not been communicated, because no underwriter, had he been aware of such a circumstance, would have executed the policy.[1]

§ 368. A common example of the principle that a person who asserts that which is contrary to a primâ facie presumption of law must prove it, is afforded by actions upon bills of exchange, for in these the plaintiff need neither allege nor prove that the bill sued upon was given for good consideration, as, in the absence of evidence to the contrary, the law presumes that fact.[2] But in an action by indorsee against the acceptor of a bill of exchange, on a defence that the bill was accepted for the accommodation of the drawer, and was indorsed to the plaintiff without value,[3] and when it was overdue,[4] and a reply traversing the latter of these allegations, the burthen of proving that no value was given for the bill, or that it was overdue at the time of indorsement, devolves on the defendant, because the defence does not contain an allegation of any fraud which would counteract the presumption arising from the possession of such an instrument.[5]

§ 369. Where, however, the defendant "taints the bill" (as it is called), that is, shows fraud or illegality *in the original transaction*,—as, for instance, after stating that the bill was originally obtained by fraud or duress, or had been given for gambling purposes,[6] or had been lost or stolen, he avers that the plaintiff

[1] Elkin *v.* Janson, 1845, 14 L. J. Ex. 201.

[2] See 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 30. See, also, R. .S. C. 1883, Ord. XIX. r. 25.

[3] Mills *v.* Barber, 1836, 1 M. & W. 427; Whittaker *v.* Edmunds, 1834, 1 M. & Rob. 366; Fitch *v.* Jones, 1855, 24 L. J. Q. B. 293.

[4] See Elkin *v.* Janson, 1845, 14 L. J. Ex. 201.

[5] Lewis *v.* Parker, 1836, 4 A. & E. 838; Jacob *v.* Hungate, 1834, 1 M. & Rob. 445; Brown *v.* Philpot, 1840, 2 M. & Rob. 285. See, also, Smith *v.* Martin, 1841, 9 M. & W. 304.

[6] The fact that a note was given for a wager on duty subject to fluctuation, does not render the in-

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held it without value, and this last fact is traversed,—the plaintiff is required to prove that he gave value, because the presumption of illegality arising from an admitted fraud in the inception of the bill is presumed to attach to every subsequent holder, and to render him incapable of recovering on such a bill in the absence of evidence showing under what circumstances he became possessed of it.[1] Similarly, if in such a case, whether the action be upon a bill[2] or upon a note, the plaintiff,[3] in answer to such a defence, merely reply a general denial,[4] and defendant gives evidence of the fraud, as soon as the illegality is proved, the onus of showing that he gave value is cast upon the plaintiff without notice of any fraud.

§ 370. On the same principle, too, that a person who asserts the negative of a legal presumption must begin and prove his denial, if a plaintiff avers that a certain party was, at a specified time, of sound mind, and this averment is traversed by the defendant, the latter is bound to prove the negative allegation of incompetency, for the law presumes every man to be sane till the contrary is shown.[5] If, however, on the trial of such an issue,

strument illegal within this rule, for such a wager was only a promise which the law would not enforce: Fitch *v.* Jones, 1855, 24 L. J. Q. B. 293.

[1] See cases cited in last four preceding notes. Also 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 30, subs. 2; and Bingham *v.* Stanley, 1841, 2 Q. B. 117; overruling Ld. Denman's decision at Nisi Prius as reported in 9 C. & P. 374. See, also, Elkin *v.* Janson, 1845, 14 L. J. Ex. 201. See also, however, Masters *v.* Barrets, 1849, 2 C. & K. 715.

[2] Harvey *v.* Towers, 1851, 20 L. J. Ex. 318; Smith *v.* Brain, 1851, 20 L. J. Q. B. 201; Hogg *v.* Skeen, 1865, 34 L. J. C. P. 158; Berry *v.* Alderman, 1853, 23 L. J. C. P. 34; Fitch *v.* Jones, 1855, 24 L. J. Q. B. 293; Mather *v.* Ld. Maidstone, 1856, 26 L. J. C. P. 58; Hall *v.* Featherstone, 1858, 27 L. J. Ex. 308.

[3] Bailey *v.* Bidwell, 1853, 13 L. J. Ex. 264, overruling Paterson *v.* Hardacre, 1811, 4 Taunt. 114. As to bills, see 45 & 46 V. c. 61, § 89.

[4] Which is now the proper pleading: see R. S. C. 1883, Ord. XIX. r. 18; ante, §§ 302, 304.

[5] See Sutton *v.* Sadler, 1857, 26 L. J. C. P. 284; Dyce Sombre *v.* Troup, 1856, Deane, Ecc. R. 38. The proposition stated in the text, that every man is presumed to be sane till the contrary is proved, is doubtless true in criminal cases. It may even be, too, that it is also true in civil cases. But, so far as probate issues are concerned, the cases are conflicting. See a learned note on the whole matter in Greenleaf on evidence, 15th edit. (1892), p. 124. The passage in the text has been allowed to stand, as it appears to express the deliberately formed opinion of the Author. As to Probate issues, however, many other text books state the law somewhat differently to the proposition in the text above, and in the above cited note to Greenleaf on Evidence (a work upon which the present treatise was, originally, to a large extent founded) it is said that, on a question of probate, the burthen of

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§§ 370, 371. the defendant puts in evidence an inquisition finding the party lunatic from a date prior to the transaction in question, this evidence, though only primâ facie and not conclusive, shifts the burthen of proof on the plaintiff, who asserts the party's sanity.[1] Thus, if it be shown that a testator was insane, or even subject to delusions,[2] at any time prior to the date of an alleged will, or within a few years after that date, the burthen of establishing his testamentary capacity will certainly be shifted on to the party propounding the will.[3]

§ 371. On the ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, or in other words, that the law always presumes innocence in the absence of convincing evidence to the contrary, in criminal cases the burthen of proof, unless shifted by legislative interference, always falls on the prosecuting party,—and this though, in order to convict, he must necessarily have recourse to negative evidence. Thus, if a statute, in the direct description of an offence, and not by way of proviso, contain negative matter, the indictment or information must both contain an allegation negativing such matter, and the allegation itself must also be supported by primâ facie evidence.[4] A better illustration of this principle cannot be given than to point out that the old (and now repealed) statutes made it an offence to either course deer in

proving that the testator was of sound mind "is, by the better cases, held to rest upon the party propounding the will." The present Editor, while he does not feel justified in altering Mr. Pitt Taylor's text, nevertheless personally agrees with the views expressed in the above cited note to Greenleaf, since, in his opinion, the maxim that "every man is presumed to be sane till the contrary appears" does not arise at all, until it has been shown that the individual, whose act is under investigation, was like other men, and, possibly, applies only in criminal cases, while the case of Sutton *v.* Sadler itself shows that a direction to the effect suggested in the text is a misdirection to a jury. As to wills, a contrary rule prevails in Massachusetts. Crowninshield *v.* Crowninshield, 1834, 2 Gray, 524 (Am.); and see Anderson *v.* Gill, 1858, 3 Macq. 180, H. L.; Smee *v.* Smee, 1879, 5 P. D. 84.

[1] Hassard *v.* Smith, 1872, Ir. R. 6 Eq. 429.

[2] Smee *v.* Smee, 1879, 5 P. D. 84.

[3] Waring *v.* Waring, 1848, 6 Moo. P. C. C. 341; Fowlis *v.* Davidson, 1848, 6 Notes of Cases, Ecc. & Mar. 473; Grimani *v.* Draper, 1848, 6 Notes of Cases, Ecc. & Mar. 420, 441; Prinsep *v.* Dyce Sombre, 1856, 10 Moo. P. C. C. 285; ante, § 197.

[4] R. *v.* Jarvis, 1756, 1 East, 644, n.; Taylor *v.* Humphries, 1864, 34 L. J. M. C. 1; Davis *v.* Scrace, 1869, L. R. 4 C. P. 172; Morgan *v.* Hedger, 1870, L. R. 5 C. P. 485; Copley *v.* Burton, 1870, L. R. 5 C. P. 489; Over *v.* Harwood, [1900] 1 Q. B. 803.

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inclosed grounds without the consent of the owner,[1] or to cut trees without such consent;[2] and that the law, having made the absence of consent a material element in such offences, on indictments for them it was necessary both to allege and to prove that the act was done without such consent. So, also, upon a summons against the parent of a child under the Vaccination Act, 1867,[3] for non-compliance with an order of justices directing him to have his child vaccinated, the burthen of proving non-compliance is upon the prosecution; it is, however, sufficient evidence to justify a conviction to prove that the certificate of vaccination required by the Act has not been received by the proper officer, as the neglect of such statutory duty raises a primâ facie presumption that the order has not been complied with.[4]

§ 372—374. The Legislature has now, however, in many instances got rid of the necessity for proving negative matter either by enactments creating the offence afresh, and omitting all mention of the negative matter,[5] but more generally by expressly enacting that the *burthen of proving authority, consent, lawful excuse*, and the like, shall lie on the *defendant*. Thus, the accused is, by the statutes relating to the offences, bound to protect himself by showing affirmatively the existence of some lawful authority or excuse where he is charged with sundry statutable offences.[6]

[1] R. *v.* Allen, 1826, 1 Den. C. C. 364; 42 G. 3, c. 107, § 1, repealed by 7 & 8 G. 4, c. 27. Other provisions, omitting all mention of consent, are now substituted by 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 13.

[2] R. *v.* Hazy, 1826, 2 C. & P. 458; 6 G. 3, c. 36, repealed first by 7 & 8 G. 4, c. 27, and, secondly, by 30 & 31 V. c. 59. Other provisions, omitting all mention of consent, are now substituted by 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), §§ 20, 21.

[3] 30 & 31 V. c. 84, § 31.

[4] Over *v.* Harwood, supra.

[5] See, for instance, the two preceding notes.

[6] Amongst such offences are: being found by night in possession of any picklock key, crow, jack, bit, or other implement of housebreaking (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 58); or buying or selling coin at an undervalue, or exporting or importing, counterfeit coin (24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), §§ 6, 7, 8, 14, 19); or making, mending, or having possession of, coining tools, or conveying such tools, or any coin or bullion, out of the Mint (24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), §§ 14, 24, 25; see R. *v.* Harvey, 1871, L. R. 1 C. C. R. 284); or having possession of paper, plates, or dies used in connection with the stamp duties (33 & 34 V. c. 98, §§ 18, 22; 54 & 55 V. c. 38 ("The Stamp Duties Management Act, 1891"), § 15); or (being licensed to sell stamps) having pos-

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session of any forged stamps (see 54 & 55 V. c. 38, § 18), or any instruments or materials for making either letter stamps (54 & 55 V. c. 38, § 13, subs. 1); or excise paper (2 W. 4, c. 16 ("The Excise Permit Act, 1832"), § 3; 11 & 12 V. c. 121, § 18), or paper used for making exchequer bills (24 & 25 V. c. 5, § 18; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 9), bank notes (24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 14), the notes of private bankers (Id. § 18), or foreign notes (Id. § 19); or for manufacturing paper similar to that used for stamps by or under the Commissioners of Inland Revenue (54 & 55 V. c. 38, § 14; see, also, 24 & 25 V. c. 5, § 18; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 10); or having possession of such paper before it has been stamped and issued for use (54 & 55 V. c. 38, § 15; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 11; 24 & 25 V. c. 5, § 19); or engraving bank notes or any part thereof (24 & 25 V. c. 98 ("The Forgery Act, 1861"), §§ 16, 17), the notes of private bankers (Id. § 18), or foreign notes (Id. § 19); or having possession of counterfeit dies for making gold and silver wares, or instruments for making such dies, or any wares of gold, silver, or base metal, having thereon forged dies (7 & 8 V. c. 22 ("The Gold and Silver Wares Act, 1844"), §§ 2, 3); or having possession of hackney-coach and stage plates, or drivers' or watermen's tickets (6 & 7 V. c. 86 ("The London Hackney Carriage Act, 1843"), § 20; and see also 30 & 31 V. c. 134 (amended by 48 V. c. 18), § 17); and certain other cognate offences (see R. *v.* Edmundson, 1859, 28 L. J. M. C. 213). The law is the same when, on a party being charged with applying any marks appropriated to Her Majesty's stores (38 & 39 V. c. 25 ("The Public Stores Act, 1875"), § 4), or with converting or having in his possession any such stores, when the same are reasonably suspected of being stolen or unlawfully obtained (§ 7; see, also, §§ 8 and 9), proof is given, or an inference raised, that he has acted (R. *v.* Wilmett, 1848, 3 Cox, C. C. 281; R. *v.* Cohen, 1858, 8 Cox, C. C. 41; R. *v.* Sleep, 1861, 30 L. J. M. C. 170) "knowingly;" so, the burthen of proof also rests (R. *v.* Banks, 1794, 1 Esp. 146) upon the accused in a prosecution under the direction of the Commissioners of Customs, in respect of goods seized for non-payment of duties, or any other cause of forfeiture, or for recovering any penalty under any Act relating to the customs; on an indictment for making a signal to a smuggling vessel at sea, the defendant (39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 259) must prove that the signal was not made for the purpose of giving illegal notice (Id. § 191); and goods found or seized under the customs laws will be deemed to be run goods, unless the owner can prove the contrary (Id. § 178). The burthen of justifying his conduct (32 & 33 V. c. 57, §§ 4, 5) also rests upon the defendant in proceedings under "The Seamen's Clothing Act, 1869." So, under "The Foreign Enlistment Act, 1870," where the breach of neutrality charged relates to the delivery of a ship to one of the States (33 & 34 V. c. 90, § 9) at war. So, under "The Merchant Shipping Act, 1894," it similarly rests where a person is charged with sending, or attempting to send, or take a ship to sea in an unseaworthy state so as to endanger life (39 & 40 V. c. 80, § 4); and in such cases the indictment need neither aver that the accused knew the ship was unseaworthy, nor negative the use of reasonable means to ensure her going to sea in a seaworthy state: R. *v.* Freeman, 1875, Ir. R. 9 C. L. 527. In any prosecution under the Act for preventing accidents by threshing machines, on proof that the machine was not duly fenced while working, the person to whom it belongs, or for whom it has been used, must "satisfy the court that he took all reasonable precautions to ensure the observance of the Act" (41 & 42 V. c. 12 ("The Threshing Machines Act, 1878"), § 1), and a similar provision is contained in the Act for preventing accidents by chaff cutting machines (60 & 61 V. c. 60 ("The Chaff Cutting Machines Accidents Act, 1897"), § 4). So, the burthen of proof that he acted innocently lies upon any person charged under "The Army Act,

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1881," with illegally purchasing from soldiers regimental necessaries, equipment, or stores, or with illegally being in possession of any such articles (44 & 45 V. c. 58, § 156, sub-ss. 1 and 2). Again, a man summoned for being unlawfully in possession of venison, must satisfy the magistrate that he came lawfully by it (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 14); and one who knowingly and unlawfully has on his premises any tree, shrub, post, pale, rail, or the like, must give a satisfactory account of how he came possessed of the article found (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 35). Persons found in possession of, or offering for sale, shipwrecked goods, are bound to show that they have not transgressed the law in taking them (Id. §§ 65, 66). In proceedings against any person for having or keeping an unlicensed theatre, or for acting for hire therein, if it be proved that the theatre is *used* for the public performance of stage plays, the burthen of proving that it is duly licensed or authorized lies on the accused (6 & 7 V. c. 68 ("The Theatres Act, 1843"), § 17). Where a male person is proved to live with or be habitually in company with a prostitute and has no visible means of subsistence, it lies upon him to prove that he is not knowingly living on the earnings of prostitution (61 & 62 V. c. 39 ("The Vagrancy Act, 1898"), § 1, subs. 3, extended to Scotland by 2 Edw. 7, c. 11, § 1, subs. 3). When a person is found drunk upon licensed premises, it lies upon the holder of the license to prove that he took all reasonable steps to prevent drunkenness on the premises (Edw. 7, c. 28 ("The Licensing Act, 1902"), § 4). In an action for a penalty under "The Public Health Act, 1875," for improperly acting as a member of a local board, the burthen of proof is in great measure shifted on to the defendant (38 & 39 V. c. 55, Sch. 2, rule 1, sub-rule 70). In any dispute in the hosiery trade between the manufacturer and the workmen respecting the alleged imperfect execution of any work, which has been delivered to the manufacturer or his agent, the work, if not produced in order to adjudication, will be deemed to have been properly executed (8 & 9 V. c. 77, § 3; 8 & 9 V. c. 128, § 3). So, on a complaint that a person employed in a factory or workshop without a surgical certificate, is under the prescribed age, if the court be of that opinion, the employer shall be liable to penalties, unless he can prove that the party employed is of the age required (1 Edw. 7, c. 22 ("The Factory and Workshop Act, 1901"), § 147, subs. (2)), and by the same Act by § 147, subs. (1); a person found in a factory or workshop except at meal times, is until the contrary is proved, deemed to have been employed there. The proof of the age of the employed also rests upon the defendant in any prosecution of a chimney sweeper for illegally employing a climbing boy (27 & 28 V. c. 37, § 10), and in any proceeding against any person for an offence under the Prevention of Cruelty to Children Act, 1904, or for any of the offences mentioned in the First Schedule of that Act or for any offence under the Employment of Children Act, 1903, in respect of a child who is alleged in the charge or indictment to be under any specified age, when the child appears to the court to be under that age, the onus of proof that the child is over that age lies on the person charged. See "The Prevention of Cruelty to Children Act, 1904" 4 Edw. 7, c. 15), § 17. Under the same Act by § 23 (3) certain presumptions are created as to who are the persons having the care or custody of the child, and in a proceeding against any person for sending circulars, &c., to an infant inviting him to borrow money, upon proof that the person to whom the document was sent was an infant, it lies upon the accused to prove that he had reasonable grounds for believing the infant was of full age (63 & 64 V. c. 51 ("The Money Lenders Act, 1900"), § 5). Similarly, the proof of the dog's age lies on the defendant on the hearing of an information for a penalty for keeping a dog without a licence, where it is said that the animal is a mere puppy (41 V. c. 15 ("The Customs and Inland Revenue Act, 1878"), § 19). A pawnbroker charged with certain

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§ 375. Moreover, as to all cases falling within the Summary Jurisdiction Act, 1879,[1] it is generally provided,[2] that "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany, in the same section, the description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant.[3]

§ 376. The first exception to the general rule that the burthen of proof rests with the party who asserts the substantial affirmative is, then, that it does not apply where there is a primâ facie presumption of law one way or the other; and it is sufficiently established by the examples which have been cited.

§ 376A. The second exception to the above-named general rule is that where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour.[4] For

offences against "The Pawnbrokers Act, 1872," is required to prove some lawful or reasonable excuse for his conduct (35 & 36 V. c. 93, § 23, r. 4, and § 31). In most prosecutions for offences against the bankrupt law, the accused may be convicted on the sole proof of his having committed the act charged, "unless the jury is satisfied that he had *no* intent to defraud," or, "to conceal the state of his affairs," or, "to defeat the law," as the case may be (32 & 33 V. c. 62, §§ 11, 12; as amended by 46 & 47 V. c. 52, § 163; 53 & 54 V. c. 71, § 26; 35 & 36 V. c. 57, §§ 11, 12, Ir.). The burthen of showing "any lawful authority or excuse" for his conduct rests upon a person charged with having committed an offence against "The Diseases of Animals Act, 1894" (57 & 58 V. c. 57), §§ 52, 53. See Huggins *v.* Ward, 1882, 8 Q. B. D. 521. On a charge against a consumer of fraudulently abstracting gas, "the existence of artificial means" for altering the index to any meter, or for preventing any meter from duly registering, or for abstracting, consuming, or using gas when such meter is under the consumer's control, is primâ facie evidence that such alteration, prevention, abstraction, or consumption has been fraudulently, knowingly, and wilfully caused by the consumer (34 & 35 V. c. 41 ("The Gasworks Clauses Act, 1871"), § 38). In charges against consumers for fraudulently abstracting it, or water supplied by meter (38 & 39 V. c. 55, § 60; 41 & 42 V. c. 52, § 70, Ir.), the burthen of proof also rests with the accused. As to cases under the Pedlars Act, see infra, § 375.

[1] 42 & 43 V. c. 49.

[2] § 39, subs. 2; "The Pedlars Act, 1871" (34 & 35 V. c. 96), § 20, sub-s. 3; 41 & 42 V c. 52, § 250, Ir., contains a similar provision.

[3] See, on the construction of this, Roberts *v.* Humphreys, 1882, L. R. 8 Q. B. 483 (decided on a very similar clause in the Licensing Acts).

[4] Dickson *v.* Evans, 1794, 6 T. R.

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instance, under the old law, in an action for penalties against a person for practising as an apothecary without a certificate,[1] as the defendant was peculiarly cognisant of the fact whether or not he had obtained a certificate, and, if he had done so, could have no difficulty about producing it, the law compelled him to produce it. Had it not been for the principle in question, the plaintiff would have been bound to prove the negative for two reasons: first, as essential to his case, and secondly, to rebut the presumption of innocence; while in fact it is for the defendant to prove that he has the certificate, and not for the plaintiff to prove that he, the defendant, is practising without it.[2]

§ 377. This second exception also prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified. It holds good, and compels the defendant to produce the necessary licence or authority (as the case may be), in proceedings for selling liquors, offences against the game laws,[3] improperly exercising a trade or profession, and the like;[4] in actions for penalties against the proprietor of a theatre, for performing dramatic pieces without the written consent of the author;[5] in

80; R. *v.* Turner, 1816, 5 M. & Selw. 206. But see the observations of Alderson, B., in Elkin *v.* Janson, 1845, 14 L. J. Ex. 201, doubting whether the exception as set out above is not too strongly stated, and suggesting that the rule only refers to the *weight* of the evidence, but that there should be some evidence to start the presumption and cast the onus on the other side. This exception has been applied in Ireland to cases in which carriers have contracted under special contracts exempting them from liability for loss or injury to goods unless occasioned by the wilful neglect or misconduct of themselves or their servants, and it has been held that upon proof of the loss or damage, the onus of proof lay upon the carriers to show the absence of such wilful neglect or misconduct; Curran *v.* Midland Great Western Ry. Co., [1896] 2 Ir. R. 183; Mahony *v.* Waterford, Limerick and Western Ry. Co., [1900] 2 Ir. R. 273, but query these cases which appear to be in conflict with the English decisions on the subject. See Haynes *v.* G. W. Ry. Co., 1879, 41 L. T. 436; Steven *v.* G. W. Ry. Co. 1885, 52 L. T. 324; and see Lewis *v.* G. W. Ry. Co., 1877, 3 Q. B. D. 195.

[1] Under 55 G. 3, c. 194 ("The Apothecaries Act, 1815"). See, now, 21 & 22 V. c. 90, § 40.

[2] Apoth. Co. *v.* Bentley, 1824, Ry. & M. 159.

[3] See 1 & 2 W. 4, c. 32 ("The Game Act, 1831"), § 42.

[4] R. *v.* Turner, 1816, 5 M. & Selw. 206; Smith *v.* Jeffries, 1821, 9 Price, 257; Hanson's case, 1821, 4 B. & Ald. 521; Sheldon *v.* Clarke, 1806, 1 Johns. 513 (Am.); U. S. *v.* Hayward, 1815, 2 Gall. 485 (Am.); Gening *v.* The State, 1822, 1 McC. 573 (Am.). See, also, Doe *v.* Whitehead, 1838, 8 A. & E. 571, cited ante, § 367, where this rule was held inapplicable.

[5] Under 3 & 4 W. 4, c. 15 ("The Dramatic Copyright Act, 1833"),

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§§ 377, 378.

proceedings for misprision of treason—where, if the treason be proved, and the knowledge of it be traced to the prisoner, he is, in strictness, bound to negative the averment of concealment by offering proof of a discovery on his part.[1] It also prevails in the Ecclesiastical Courts, so that, in proceedings against a clergyman for non-residence without licence or exemption, the prosecution need neither allege nor prove that the defendant had not a licence, or that he was not resident on another benefice; but if defendant have a licence he must produce it.[2]

§ 378. The third rule governing the production of evidence, namely, that the burthen of proof generally lies upon the party who substantially asserts the affirmative, has now been in itself sufficiently considered. But in connection with this rule questions frequently arise with respect to the *right to begin*. Therefore, it will be well to conclude this chapter with a discussion upon this important subject. This is, indeed, strictly speaking, perhaps a digression from the subject of the chapter, namely, the consideration of the rule as to the Burthen of Proof. Yet it is so intimately connected with the subject, so obviously must be determined with a due regard to the principles contained in this third rule, and so important, that its consideration will certainly not be irrelevant. The "*right to begin*,"—in other words, the privilege of opening the case to the jury—is often one of considerable advantage before any tribunal,[3] but in particular at Nisi Prius. It not only enables a party to create an impression in his favour, which it may be difficult subsequently to erase, but also secures him the last word, in the event of evidence being adduced by his opponent. Still, cases sometimes occur where a defendant goes to trial relying simply on the weakness of the plaintiff's case, and where, if called upon to begin, he will instantly be defeated.[4] The duty of beginning is, consequently,

§ 2; Morton *v.* Copeland, 1855, 24 L. J. P. C. 517 (Am.).

R. *v.* Thistlewood, 1820, 33 How. St. Tr. 691 (Abbott, C.J., in charge to grand jury).

[2] Bluck *v.* Rackman, 1840, 5 Moo. P. C. C. 308 (P. C.).

[3] On the hearing of appeals in equity the appellant always used to begin: Williams *v.* Williams, 1856, 37 L. J. Ch. 854.

[4] Best "*On Right to Begin*," 27, 28. See, *e.g.*, Edwards *v.* Jones, 1837, 7 C. & P. 633; where, in an action on a note by indorsee against maker, the plea (in substance) was want of consideration; the plaintiff having replied, as to part of the sum claimed, that he gave consideration, and as to the residue, nolle prosequi,

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seldom a matter of indifference, but is generally regarded as an object which it is important either to attain or to avoid, according to the circumstances. The principles which govern the question as to who has the privilege or duty (as the case may be) of the "*right to begin*" are difficult of application, and are, moreover, not very distinctly understood, and the decisions as to such right are alike numerous and conflicting. A detailed examination of them all would be out of place here, but a few general rules may, perhaps, be of practical value.

§ 379. The first general rule as to the right to begin is, that *the party on whom the onus probandi lies*,[1] *as developed on the record, must begin*.[2] It sometimes is said that the right of beginning belongs to the party on whom the affirmative of the issue lies; but this assertion, if literally understood, is by no means accurate, since (as we have seen) it does not apply either where the affirmative allegation is supported by a legal presumption, or the truth of the negative averment is peculiarly within the knowledge of the party who relies on it.[3] And the rule as to the *Right to begin* is, in whatever form it may be stated, subject to some *exceptions*. First, in some cases, if *at the trial* the defendant will admit the *whole* primâ facie case of the plaintiff, he will be entitled to begin, provided he was not bound to have made this admission by his pleading at an earlier period. For instance, this is so in a claim by a person as heir-at-law of the person last in possession against a devisee under such person's will, if the defendant admits not only that plaintiff is heir, but that the ancestor, through whom he claims, died seised.[4]

§ 380. The exception will, however, be strictly confined to cases where the defendant admits the *whole title* of the plaintiff.

Alderson, B., held that defendant must begin, and as he could not, plaintiff had a verdict.

[1] As to the best tests of the onus probandi, see ante, § 365.

Thus, where a husband petitions for a restitution of conjugal rights, a respondent who answers by pleading cruelty is entitled to begin: Cherry v. Cherry, 1858, 28 L. J. P. & M. 36.

[2] Best "*On Right to Begin*," 29. See ante, §§ 367, 376.

[4] Goodtitle *v.* Braham, 1792, 4 T. R. 698; Doe *v.* Brayne, 1848, 17 L. J. C. P. 127; Doe *v.* Barnes, 1834, 1 M. & Rob. 386. In Doe *v.* Smart, 1835, 1 M. & Rob. 476 (Gurney, B., after consulting Patteson, J.), defendant was allowed to begin, though plaintiff, as to part of the premises, was prepared to prove that he was assignee of an outstanding term. See, now, R. S. C. 1883, Ord. XXI. r. 21, cited ante, § 301, n. [2].

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§§ 380, 381—2.

Therefore, if defendant, in an action to recover land, admit at the trial a will under which the plaintiff claims, and rely on a subsequent devise or codicil, he will not be entitled to begin. For so far from admitting the *whole* title of the plaintiff, he would expressly deny a most material part of it, since by setting up a second will or codicil, he would in effect assert that his opponent was not devisee at the time of the testator's decease.[1] Again, a defendant whose title rests upon a conveyance from the ancestor,[2] or in part under the ancestor's marriage settlement,[3] cannot, by simply admitting his opponent's heirship and his own possession, deprive the former of his right to begin, because such an admission will not cover the entire title of the plaintiff. Where, too, each party claims as heir-at-law, and the defendant is clearly the heir, *if legitimate*, his admission of a conditional title in the plaintiff, *if* the defendant was illegitimate, is insufficient to give him the right to begin, because the plaintiff, in order to recover, must prove his own title; for although in this particular case the title may depend on defendant's legitimacy, the legitimacy does not constitute the direct issue.[4]

§ 381—2. A second *exception* to the general rule that the party on whom lies the onus probandi, as developed on the record, must begin, is that the plaintiff begins in all actions where he seeks *substantial and unliquidated damages, though the affirmative lie upon the defendant.* This doctrine rests upon the broad principles of public convenience and justice, and was promulgated by a majority of the judges many years back, as applicable to actions for *libel, slander, and injuries to the person*, and extended (in 1845) by a considered judgment of the Court of Queen's Bench.[5] Its operation was subsequently extended to

[1] Doe *v.* Brayne, 1848, 17 L. J. C. P. 127, overruling Doe *v.* Corbett, 1813, 3 Camp. 368, and an anonymous case cited by Ld. Denman in Doe *v.* Barnes, 1834, 1 M. & Rob. 386.

[2] Doe *v.* Tucker, 1830, M. & M. 536.

[3] Doe *v.* Lewis, 1843, 1 C. & K. 122.

[4] Doe *v.* Bray, 1828, 8 B. & C. 813.

[5] In Mercer *v.* Whall, 1845, 14 L. J. Q. B. 267, an action by a solicitor's clerk for wrongful dismissal, which defendant justified by pleading misconduct on his part, plaintiff was held entitled to begin. See judgment therein delivered by Ld. Denman. (Parke. B., never assented to this exception, but was always of opinion that "in all cases he on whom the burthen of proof lay ought to begin"). See, also, Carter *v.* Jones, 1833, 1 M. & Rob. 281.

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actions of covenant and assumpsit, and indeed, as it would seem to *all actions*, where the plaintiff is seeking to recover actual damages of an *unascertained* amount.[1]

§ 383. This second exception, however, does not extend to cases where the plaintiff seeks to recover a debt, or a liquidated demand in money;[2] since in such actions, unless a specific denial of the claim be placed on the record, the plaintiff is not required to give any evidence as to its amount. Neither does such exception apply where the damages sought to be recovered, though technically unliquidated, are obviously nominal;[3] nor where they are admitted by the defendant, so far as amount is concerned:[4] nor where they can be ascertained by mere computation, as, for instance, where the action is brought on a bill of exchange or a promissory note;[5] nor where the plaintiff will not say whether or not he intends to proceed for substantial damages.[6]

§ 384. A second general rule as to the right to begin, is that *if the record contains several issues, and the burthen of proving any one of them lies on the plaintiff, he is entitled to begin provided he will undertake to give evidence upon it.*[7] This rule will equally prevail, though it clearly appears, as a matter of calculation, that if the defendant should eventually succeed on a certain one of the issues, the proof of which lies upon him, the plaintiff will recover nothing on the issue which lies upon him.[8] But the proviso at the end of the rule constitutes a material part of it; and, therefore, if a mere claim in general terms for an unliquidated money demand has been added to some special claim for liquidated damages, and the defendant, while confessing and avoiding the special claim for the liquidated amount, specifically denies that made in general terms for the unliquidated amount,

[1] See Foley *v.* Tabor, 1861, 2 F. & F. 663.

[2] Woodgate *v.* Potts, 1847, 2 C. & K. 457; Fowler *v.* Coster, 1828, 3 C. & P. 463 (Ld. Tenterden); Bonfield *v.* Smith, 1843, 2 M. & Rob. 519; R. S. C. 1883, Ord. XXVII. r. 2.

[3] Hodges *v.* Holder, 1813, 3 Camp. 366; Jackson *v.* Hesketh, 1819, 2 Stark. R. 518.

[4] Tindall *v.* Baskett, 1861, 2 F. & F. 664.

[5] Cannam *v.* Farmer, 1849, 2 C. & K. 746; R. S. C. 1883, Ord. XXXVI. r. 57.

[6] Chapman *v.* Rawson, 1845, 15 L. J. Q. B. 225.

[7] Rawlins *v.* Desborough, 1840, 2 M. & Rob. 328.

[8] Cripps *v.* Wells, 1843, C. & Mar. 489; recognised in Booth *v.* Milns, 1846, 15 L. J. Ex. 354.

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§§ 384—386.

such a denial will not entitle the plaintiff to begin, unless in fact he intends to rely on the claim which has thus been made in general terms for an unliquidated amount, and to adduce evidence in support of it.[1] The effect of the proviso is, in short, this: that it must be the object of an opening to explain to the jury the facts which the witnesses are going to prove.

§ 385. Sometimes the burthen of proof of some one or more issues lies upon the plaintiff, while that of proving others lies upon the defendant. Under such circumstances the plaintiff may (at his own option) either go into the whole case in the first instance, or else elect to only give evidence with regard to those issues which he is himself bound to prove, reserving the right of rebutting his adversary's proofs, in the event of the latter establishing a primâ facie case in support of the issues which lie upon him.[2] The last-named course is, in practice, most usually adopted; and if it is followed, the defendant may have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence by way of reply; in other words, he "cannot split his case;" since if such a privilege were allowed to a plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length.[3]

§ 386. Accordingly, in an action by the indorsee of a bill against the acceptor, where the only issue was on a defence denying the indorsement, the plaintiff was not allowed to rest

[1] Smart *v.* Rayner, 1834, 6 C. & P. 721; Mills *v.* Oddy, 1834, 6 C. & P. 728; overruling Homan *v.* Thompson, 1834, 6 C. & P. 717; Faith *v.* M'Intyre, 1835, 7 C. & P. 44; Oakeley *v.* Ooddeen, 1861, 2 F. & F. 651. See Edge *v.* Hillary, 1852, 3 C. & K. 43, where to an action for goods sold, defendant pleaded, except as to 150*l.*, the general issue, and as to that sum a special plea. The plaintiff's particulars limited his demand to 150*l.*, and it was held (Ld. Campbell) that defendant should begin.

[2] Formerly, when either by pleading or notice, the defence was known, the plaintiff was bound to open his whole case: Rees *v.* Smith, 1816, 2 Stark. R. 30; but this practice having been found inconvenient, has been abandoned: Browne *v.* Murray, 1825, Ry. & M. 254; Shaw *v.* Beck, 1853, 8 Ex. 392. See Penn *v.* Jack, 1866, L. R. 2 Eq. 314.

[3] Browne *v.* Murray, 1825, Ry. & M. 254; Sylvester *v.* Hall, 1825, Ry. & M. 255, n. In Williams *v.* Davies, 1833, 52 L. J. M. C. 87, a different course was, indeed, permitted; sed qy. if it be allowed now.

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his case at first on testimony given to identify the endorser's handwriting, and after evidence for the defence had been given proving that plaintiff himself was too poor to have discounted the bill and that he had disclaimed all knowledge of it, to call by way of reply evidence to show that, in point of fact, plaintiff actually had discounted the instrument.[1] A further illustration of the same principle will be found on a later page.[2]

§ 387. The question respecting the right to begin or to reply is a matter of practice and regulation upon which the presiding judge must exercise his discretion. Accordingly, the court will not interfere with his decision, unless it be clearly proved, not only that the ruling of this point was *manifestly wrong*, but that it has occasioned substantial injustice.[3] It will not grant a new trial, merely because the judge has either admitted evidence in reply which should in strictness have been produced in support of the plaintiff's original case,[4] or has prevented the plaintiff from calling witnesses in anticipation of the defendant's case, provided such witnesses be subsequently examined in reply.[5] The right to begin, however, usually draws after it, both in civil and criminal proceedings, whenever the adversary adduces evidence to the jury in support of his case, *some* right of reply.[6] The right of reply thus conferred may be either (a) a right to make a further speech in reply to the adversary's case, or (b) a right to *call evidence* in reply to such case.

§ 387A. With these prefatory remarks, civil and criminal cases must be separately considered.

§ 387B. In civil cases a right even to make a speech in reply is not conferred by the mere commenting on a cash-book, which has been used to refresh the memory of one of the adverse witnesses, or

[1] Jacobs *v.* Tarleton, 1848, 17 L. J. Q. B. 194. See, also, Wright *v.* Wilcox, 1850, 19 L. J. C. P. 333.

[2] Infra, § 387.

[3] Brandford *v.* Freeman, 1850, 20 L. J. Ex. 36; Edwards *v.* Matthews, 1847, 16 L. J. Ex. 291. See, also, Burrell *v.* Nicholson, 1833, 1 M. & Rob. 306; Bird *v.* Higginson, 1834, 2 A. & E. 696; Huckman *v.* Fernie, 1838, 7 L. J. Ex. 163; Doe *v.* Brayne, 1848, 17 L. J. C. P. 127; Booth *v.* Millns, 1846, 15 L. J. Ex. 354; Chapman *v.* Emden, 1841, 9 C. & P. 717; Doe *v.* Rowlands, 1840, 9 C. & P. 734; Mercer *v.* Whall, 1845, 14 L. J. Q. B. 267; Geach *v.* Ingall, 1845, 15 L. J. Ex. 37.

[4] Williams *v.* Davies, 1833, 11 Q. B. D. 74; Doe *v.* Bower, 1851, 3 B. & Ad. 459. See also R. S. C., Ord. XXXIX. r. 6.

[5] Smith *v.* Marrable, 1842, 12 L. J. Ex. 223.

[6] Best "*On The Right to Begin*," 85, and cases there collected.

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§§ 387b—387d. even by a reference to parts of this book, not looked at by such witness,[1] nor by the production of a paper, which the judge has called for in order to satisfy his conscience.[2] Nor will the plaintiff be entitled to a speech in reply, because, in the course of the trial, it has become necessary for the defendant to call witnesses to inform *the judge* upon a question respecting the admissibility of evidence.[3]

§ 387c. In criminal cases where several prisoners are jointly indicted, and one of them calls witnesses, or puts any documents in evidence for the defence, except in cases where the defendant is the only witness called,[4] the counsel for the prosecutor has a strict right to reply generally, if the charge be a joint one, and the evidence affects the prisoners generally. If, however, the charges be separate (as for stealing and receiving), or the defence be a separate one (as an alibi), counsel for the prosecution has not a general, but only a special, reply, and must in his reply confine his remarks to the case of the party for whom witnesses have appeared.[5] Again, "if the only evidence called on the part of a prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper to do so."[6] When the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness under the Criminal Evidence Act, 1898, does not of itself confer on the prosecution the right of reply.[7]

§ 387d. It has not been clearly decided whether the counsel for the plaintiff or the prosecution will be entitled to reply, if the defendant, *without adducing evidence*, opens new facts; but the better opinion is that no such right can be *claimed*, though the judge may, in a flagrant case, permit its exercise.[8]

[1] Pullen *v.* White, 1828, 3 C. & P. 434.
[2] Dowling *v.* Finigan, 1824, 1 C. & P. 587.
[3] Harvey *v.* Mitchell, 1841. 2 M. & Rob. 366; Dover *v.* Maestaer, 1804, 5 Esp. 96. See ante, § 23.
[4] 61 & 62 V. c. 36 ("The Criminal Evidence Act, 1898").
[5] R. *v.* Hayes, 1838, 2 M. & Rob. 155; R. *v.* Blackburn, 1853, 6 Cox, C. C. 339; R. *v.* Burns, 1887, 16 Cox, C. C. 195; R. *v.* Trevelli, 1882, 15 Cox, C. C. 289; R. *v.* Jordan, 1839, 9 C. & P. 118; R. *v.* Kain, 1883, 15 Cox, C. C. 388.
[6] Resolution of the judges, 1837, reported 7 C. & P. 676.
[7] 61 & 62 V. c. 36, § 3.
[8] Crerar *v.* Sodo, 1827, 3 C. & P. 10. See, in favour of the right, R. *v.* Horne, 1777, 20 How. St. Tr. 664; R. *v.* Bignold, 1824, Dow. & Ry. N. P. 59; R. *v.* Carlisle (Park, J.); Best "*On The Right to Begin*," 92—94;

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§ 388. As to the nature of the *evidence* which may be called in reply, the remarks made on a previous page to the effect that the party beginning is "not allowed to split his case,"[1] must in the first place be borne in mind. Regard must also be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the judge in the exercise of his discretion.[2] Thus, where a plaintiff in ejectment made out a primâ facie case as heir-at-law, which was met by a will being proved for the defendant, he was permitted, in reply, to put in a subsequent will whereby the estates claimed were devised to himself; for although this will proved him to be entitled to the premises as devisee, and thus set up a title different from that on which he originally relied, it operated also as a revocation of the former will, and thus demolished the defendant's case.[3] Indeed, in one case, where the plaintiff in an accident case originally offered evidence to show that the defendant was at Layton at a given time, and the defendant had called witnesses to show that he was then at Richmond, the judge refused to exclude further witnesses, tendered in reply by the plaintiff to prove that the defendant was not at Richmond, but at Layton, at the time in question.[4] On the other hand, where the issue was as to the soundness of a horse, which was exhibited to the jury during the defendant's case, the plaintiff was not allowed to recall his veterinary witnesses, who had possessed an opportunity of inspecting the horse before the plaintiff's case had been closed, but had only seen him on the view in question, to give their opinion respecting his soundness.[5]

§ 388.

against it, Best, id. 94—99; Faith *v.* M'Intyre, 1835, 7 C. & P. 44; Stephens *v.* Webb, 1835, 7 C. & P. 60; R. *v.* Abingdon, 1794, Peake, R. 236; Naish *v.* Brown, 1846, 2 C. & K. 219.

Supra, § 38.

[2] Wright v. Wilcox, 1850, 19 L. J. C. P. 333.

[3] Doe *v.* Gosley, 1839, 9 C. & P. 46. Sed qu. as to the present practice. See R. S. C. 1883, Ord. XXI. r. 21, and Ord. XXIII. r. 6, cited ante, § 301.

[4] Briggs *v.* Aynsworth, 1838, 2 M. & Rob. 168. This case certainly carries the privilege of adducing evidence in reply to its extreme limit; for although the plaintiff was at liberty to disprove the alibi by showing that the defendant was not at Richmond, yet when the witnesses went on to prove that he was at Layton, they not only gave evidence which ought to have been submitted to the jury in the first instance, but confirmed that which was actually given in chief, and which, consequently, should have been then exhausted (see note *a* to S. C. pp. 169, 170).

[5] Osborn *v.* Thompson, 1839, 9 C. & P. 337.

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§§ 389, 390.

§ 389. In civil cases in which evidence is taken by affidavit under R. S. C. 1883, Order XXXVIII., it is expressly provided R. 27,—in accordance with the practice described in the preceding section,—that the plaintiff's affidavits in reply "shall be confined to matters *strictly in reply*."[1]

§ 390. With regard to the nature of the evidence which may be called in reply in criminal cases, sufficient guide will for the most part be obtained from what has already been said as to the practice in civil cases. But in criminal cases it is further a rule that on the trial of *public prosecutions*, whether for felony or misdemeanour, *directly instituted by the Crown*, and conducted personally by the law officers of the Crown, but not on prosecutions merely directed by them,[2] such law officers are in strictness entitled to reply, even if no evidence be adduced on the part of the defendant.[3] As, however, this is a privilege, or rather a prerogative, opposed to the ordinary practice of the courts, and is, emphatically, "more honoured in the breach than the observance," it should be watched with jealousy. Mr. Horne, in 1777, observed that the Attorney-General would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim.[4]

[1] But this rule appears to have been disregarded in Peacock *v.* Harper, 1878, 7 Ch. D. 648. Sed qu.

[2] By a resolution of the judges come to in 1877, and reported in 5 St. Tr. N. S. p. 34, it was resolved: "That in those Crown cases in which the Att.-Gen. and Sol.-Gen. is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed, as a right, to the counsel for the Crown, and in no others." It had before this, in R. *v.* Christie, 1858, 7 Cox, C. C. 506, been held that the privilege does not extend to the Att.-Gen. of the County Palatine, and that where such prosecution was not conducted by a law officer in person, it did not extend to a prosecution directed by the Poor Law Board: R. *v.* Beckwith, 1858, 7 Cox, C. C. 505; but that it did apply to Post-Office Prosecutions, and that it extended to the Sol.-Gen., as well as to the Att.-Gen.: R. *v.* Toakley, 1866, 10 Cox, C. C. 406; R. *v.* Barrow, 1866, 10 Cox, C. C. 407. With respect to the Att.-Gen. of the Prince of Wales, see Att.-Gen. of P. of Wales *v.* Crossman, 1866, L. R. 1 Ex. 381. The authorities as to the Att.-Gen.'s right of reply are collected 2 St. Tr. (N. S.) 1019.

[3] Resolution of the judges in 1837, reported 7 C. & P. 676: R. *v.* Horne, 1777, 20 How. St. Tr. 664; R. *v.* Marsden, 1829, M. & M. 439. The same rule prevails in the Revenue side of the Queen's Bench Div. in all cases where the Crown is concerned: M. of Chandos *v.* Comrs. of Inl. Rev., 1851, 20 L. J. Ex. 269.

[4] 1777, 20 How. St. Tr. 663. Those who wish for further information respecting the subjects discussed in this chapter are referred to Mr. Best's work "*On The Right to Begin.*"

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CHAPTER IV.

BEST EVIDENCE.

§ 391. § 391.[1] The fourth of the rules which have been laid down[2] as governing the production of evidence is, that *the best evidence, of which the case in its nature is susceptible*, should always be presented. This rule does not demand that the greatest amount of evidence which can possibly be given of any fact should be offered; it is designed to prevent the introduction of such evidence as, from the nature of the case, allows room for supposing that better evidence is in the possession of the party, and to prevent fraud. For when better evidence than that which is offered is withheld, it is only fair to presume, that the party has some sinister motive for not producing it, which would be frustrated if it were offered.[3] The rule is thus essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable.[4] For instance, depositions are in general admissible only after proof that the parties who made them cannot themselves be produced;[5] and a preliminary agreement, which has been followed up by the execution of a deed of conveyance, cannot be admitted as evidence to show what parcels were subsequently conveyed.[6] For the contents of every deed must be proved by the production of the deed itself, if such deed be

[1] Gr. Ev. § 82, in part.
[2] Ante, § 217.
[3] See Strother *v.* Barr, 1828, 5 Bing. 136; Brewster *v.* Sewell, 1820, 3 B. & Ald. 296; Twyman *v.* Knowles, 1853, 22 L. J. C. P. 143; Clifton *v.* U. S., 1846, 45 U. S. 242.
[4] 1 Phil. Ev. 418; 1 St. Ev. 500; Glassf. Ev. 266—278; Taylor *v.* Riggs, 1828, 26 U. S. 591; U. S. *v.* Reyburn, 1832, 31 U. S. 352; Minor *v.* Tillotson, 1833, 32 U. S. 100 (Am.).
[5] B. N. P. 239; R. S. C., Ord. XXXVII. r. 18.
[6] Williams *v.* Morgan, 1850, 15 Q. B. 782.

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§§ 391—393.

within the control of the party. For every deed is the best evidence of its own contents, and its non-production raises a presumption that it contains some matter of defeasance. On the same principle, if there be duplicate originals of a deed all must be accounted for, before secondary evidence can be given of any one.[1]

§ 392. Similarly, an instrument, *requiring attestation* to its validity,[2] must in general be proved by calling a subscribing witness;[3] and if there be two such witnesses, it will not be sufficient so long as one of them is alive, sane, free from permanent sickness, within the jurisdiction of the court, and capable of being found by diligent inquiry, to prove the signature of the other who is dead; for such evidence would merely *raise a presumption* that the deceased had witnessed all which the law requires for the due execution of the instrument; whereas the surviving witness would have been able to *give direct proof*. Such direct testimony is evidence of a better and higher nature than mere presumption arising from the proof of the witness's handwriting.[4]

§ 393. The rule under discussion only excludes evidence which *itself indicates the existence of more original sources* of information. Therefore, when there is no substitution of inferior evidence, but only a selection of weaker, instead of stronger, proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.[5] For, instance, in proof or disproof of handwriting, or in proof of the contents of a letter which cannot be produced, it is not necessary to call the supposed writer;[6] where it is necessary to prove negatively that an act was done without the consent, or against the will, of another, the person whose will or consent is denied, need not be himself called,[7] and where an instrument is required to be

[1] Alivon *v.* Furnival, 1834, 3 L. J. Ex. 241.

[2] As to proving execution of documents *not* requiring attestation, see 28 & 29 V. c. 18, § 7.

[3] Bowman *v.* Hodgson, 1867, L. R. 1 P. D. 362.

[4] Wright *v.* Doe *d.* Tatham, 1834, 1 A. & E. at pp. 21, 22, per Tindal, C.J.

[5] 1 Ph. Ev. 418. See Alfonso *v.* U. S., 1843, 2 Story R. 421 (Am.).

[6] R. *v.* Hurley, 1843, 2 M. & Rob. 473; Hughes' case, 1802, 2 East, P. C. 1002; M'Guire's case, 1801, 2 East, P. C. 1002; R. *v.* Benson, 1810, 2 Camp. 508; Liebman *v.* Pooley, 1816, 1 Stark. R. 167; Bank Prosecutions, 1819, R. & R. 378.

[7] R. *v.* Hazy, 1826, 2 C. & P. 458;

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attested by two witnesses, it is only necessary,—excepting in the case of wills relating to real estate,—to call one of them, though the other may be at hand.[1] Even the previous deposition of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor.[2]

§ 393A. The rule requiring the *best evidence* to be presented has been to some extent modified by a recent Rule of Court,[3] which provides that upon the hearing of the summons for directions, which, as we have seen,[4] now precedes the hearing of nearly all cases in the High Court, "the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries or otherwise as the court or judge may direct."[5] A somewhat similar provision is also contained in the regulations as to commercial cases,[6] which, however, although worded somewhat differently to the Rule of Court mentioned above, does not give to the judge of the commercial court any additional power to dispense with the technical rules of evidence beyond that possessed by other judges of the High Court.[7]

§ 394.[8] The rule that in each case *the best* attainable evidence is required to be given naturally suggests that *all* evidence is divided into PRIMARY and SECONDARY. *Primary evidence* is the best or highest evidence, or, in other words, that kind of proof which, in the eye of the law, affords the greatest certainty of the

R. *v.* Allen, 1826, 1 Den. C. C. 364; R. *v.* Hurley, 1843, 2 M. & Rob. 473.

[1] Andrew *v.* Motley, 1862, 32 L. J. C. P. 128; Belbin *v.* Skeats, 1857, 27 L. J. P. & M. 76; Forster *v.* Forster, 1864, 33 L. J. P. & M. 113; Anstey *v.* Dowsing, 1745, 1746, 2 Str. 1253; Gr. Ev. 120, 122, 123.

[2] Wright *v.* Doe *d.* Tatham, 1834; 1 A. & E. 3.

[3] Ord. XXX. r. 7.

[4] Ante, § 299.

[5] This rule has been made in pursuance of § 3 of the Judicature Act, 1894 (57 & 58 V. c. 16), which enacts, "It is hereby declared that the power to make rules conferred by the Judicature Acts, 1873 to 1894, includes power to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given, . . . (b) on any application upon summons for directions in pursuance to such rules." Neither this section nor the rule are very happily worded, and it appears quite open to argument that the section only authorises rules as to the manner of giving evidence *upon* the summons for directions itself, and that, therefore, the rule above mentioned is *ultra vires*.

[6] R. 6.

[7] Baerlein *v.* Chartered Mercantile Bank, [1895] 2 Ch. 488.

[8] Gr. Ev. § 84, in part.

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§§ 394–396.

fact in question. Until it is shown that the production of this evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree, and suggesting on the face of it that other and better evidence is attainable, is termed *secondary*. The question whether evidence is primary or secondary has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law, and not of fact; referring only to the *quality*, and not to the *strength* of the proof. Evidence, which carries on its face no indication that better remains behind, is not secondary, but primary.

§ 395.[1] But though all information must, if possible, be traced to its fountain head, yet if there be several distinct sources of information of the same fact, it is not in general necessary to show that they have all been exhausted, before recourse can be had to secondary evidence with respect to one of them.[2] For instance, if it be requisite to prove that a collector has received certain sums of money, primary evidence of that fact is the evidence of the collector himself if he be alive, or else the evidence of the parties who paid him, while (if the collector be dead) secondary evidence—such as entries in his book acknowledging the receipt, or if the book itself be in the hands of the opposite party, who, after notice, refuses to produce it, even secondary evidence of its contents—is also admissible.[3]

§ 396.[4] The cases which most frequently call for the application of the rule that the best evidence of which the case is susceptible must always be produced, are those which relate to the *substitution of oral for written evidence*. The effect of the rule on these

[1] Gr. Ev. § 84, as to first four lines.

Cutbush *v.* Gilbert, 1818, 4 Serg. & R. 555 (Am.); U. S. *v.* Gibert, 1834, 2 Sumn. 19, 80, 81 (Am.).

[2] Middleton *v.* Melton, 1829, 10 B. & C. 322; Barry *v.* Bebbington, 1792, 4 T. R. 514. The distinction between this case and that of the two subscribing witnesses to an instrument, where, as we have seen (ante, § 392), proof must be given that both the witnesses are unable to be called, before evidence of the handwriting of one of them can be received,—seems to be, that the attesting witnesses are either rendered necessary by statute, or at least have been solemnly chosen by the parties, as the persons on whose united testimony they wish to rely, and, consequently, so long as one of them can be called, secondary evidence respecting the other cannot be admitted.

[4] Gr. Ev. § 85, as to first three lines.

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cases is to render it necessary that the *contents of a written instrument, which is capable of being produced, be proved by the instrument itself, and not by parol evidence.*[1] Lord Tenterden[2] said: "I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."[3] Lord Wynford observed: "I seldom pass a day in a Nisi Prius court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost."[4] An additional but important reason for the application of the rule in the manner pointed out is, that the court may acquire a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part.[5]

§ 397. The rule requiring every written document to be proved by production of the document itself in civil courts[6] often

[1] The Queen's case, 1820, 2 B. & B. 289 (H. L.).

[2] Gr. Ev. § 88, in part.

[3] Vincent *v.* Cole, 1828, M. & M. 258.

[4] Strother *v.* Barr, 1828, 5 Bing. 131.

[5] The Queen's case, 1820, 2 B. & B. 287 (H. L.).

[6] In criminal courts a stamp objection does not apply at all: "The Stamp Act, 1891" (54 & 55 V. c. 39), § 14, sub-sect. 4.

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§ 397. indirectly inflicts grave injustice[1] in consequence of the stamp laws. For, as a general rule, a document which is inadmissible for want of a stamp[1] to prove the fact it primâ facie shows is also inadmissible for any purpose whatever,[2] even a collateral purpose—so that, for example, an insufficiently stamped promissory note cannot be used as evidence of the receipt of money by the maker of such note.[3] An exception to this rule indeed prevails when it is only sought to use a document to refresh the memory.[4] And, moreover, the judges, some years ago, promulgated a rule (which is, perhaps, of questionable expediency), that, unless the want or insufficiency of a stamp be pointed out at the earliest possible period, that is, as soon as the document is tendered in evidence, an objection on that ground will not be entertained.[5] And a further attempt has been made to, as the Common Law Commissioners express it,[6] "reconcile the claims of justice with the interests of the revenue," by enabling all such instruments as may be stamped after execution to be received in evidence, though unstamped, or insufficiently stamped, if the party who tenders them is prepared at the trial to pay to the officer of the court the proper duty,[7] the penalty, and a further sum of 1*l*.[8]

See per Ld. Tenterden, in Reid *v.* Batte, 1829, M. & M. 414. The law as to stamps is now contained for the most part in "The Stamp Act, 1891" (54 & 55 V. c. 39).

[2] Interleaf Publishing Co. *v.* Phillips, 1885, C. & E. 315. On a motion to restrain a company from carrying out an agreement for the sale of its undertaking, the court looked at a copy of the document, although the original was unstamped, not as being an agreement, but as a document evidencing the terms upon which the company proposed to sell if not restrained from so doing: Mason *v.* Motor Traction Co., [1905] 1 Ch. 419.

[3] Ashling *v.* Boon, [1891] 1 Ch. 568.

[4] See post, § 1411.

[5] Robinson *v.* Ld. Vernon, 1859, 29 L. J. C. P. 310. See ante, § 309.

[6] 2nd Rep. p. 26.

[7] A document to be "duly stamped" must be stamped "in accordance with the law in force at the time when it was first executed." 54 & 55 V. c. 39, § 14, sub-sect. 4; Clarke *v.* Roche, 1877, 46 L. J. Ch. 372.

[8] 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 14, sub-sects. 1 and 2, enacts, that "upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds. The officer or

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Further, it is provided that instruments executed abroad may be stamped within thirty days of their being received in the United Kingdom.[1] And this provision applies to a charterparty *wholly executed abroad.*[2] By R. S. C., 1883, Ord. XXXIX. r. 8, it is also provided that "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." This provision impliedly restrains a judge at Nisi Prius from reserving for the court any question respecting the sufficiency of a stamp on a document admitted by him at the trial,[3] and makes the ruling of the judge final in all cases.[4] In the criminal courts, no objection can now be taken to the admissibility of any document in evidence for want of a sufficient stamp.[5]

§ 398. The cases under the rule requiring the contents of a document to be proved by the document itself, if its production be possible,[6] may be arranged in three classes: the *first* class containing those instruments which the law requires to be in writing; the *second*, those contracts which the parties have put in writing; and the *third*, all other writings material to the issue, the existence or contents of which are disputed.[7]

§ 399.[8] The *first* class of cases in which oral evidence cannot be substituted for the writing are those in which there exists any *instrument which the law requires to be in writing.* The law having required that the evidence of the transaction should be

arbitrator or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to such person as the commissioners may appoint the money received by him for the said duty and penalty."

[1] See now 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 15, sub-sect. 3.

[2] The Belfort, 1884, 9 P. D. 215.

[3] Siordet *v.* Kuczinski, 1855, 25 L. J. C. P. 2; Tattersall *v.* Fearnley, 1856, 17 C. B. 368; Cory *v.* Davis, 1863, 14 C. B. (N.S.) 370.

[4] Blewitt *v.* Tritton, [1892] 2 Q. B. 327 (C. A.). It has also been held that no appeal lies from the ruling of a county court judge, that a document tendered in evidence is sufficiently stamped: Mander *v.* Ridgway, [1898] 1 Q. B. 501.

[5] 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 14, sub-sect. 4.

[6] Gr. Ev. § 85, in part.

[7] The question how far witnesses may be cross-examined as to written statements made by them without producing the writings will be discussed hereafter. See post, §§ 1446 et seq.

[8] Gr. Ev. § 86, as to first six lines.

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§§ 399, 400.

in writing, no other proof can be substituted for that so long as the writing exists, and is in the power of the party. Accordingly, parol evidence is inadmissible to prove records, public and judicial documents, official informations[1] or examinations, deeds of conveyance of lands, wills other than nuncupative, acknowledgments under Lord Tenterden's Act, promises to pay the debt of another person, and other writings mentioned in the Statute of Frauds; or to show at what sittings or assizes a trial at Nisi Prius came on,[2] or even that it took place at all, the only proper evidence of this being the record, or at least the record with a minute of the verdict indorsed on it,[3] nor to prove the date of a party's apprehension for a particular offence, as the warrant for apprehension or committal is superior evidence,[4] as it also is to prove the testimony of a witness when it is required by law that it should be reduced into writing,—as, for instance, when it is taken by depositions, either before an examiner of the court, or before a magistrate on an indictable charge,—since the writing is in all subsequent proceedings, whether civil or criminal, the best evidence of what the witness has stated;[5] and so it also is as to the statement of a prisoner before the magistrate upon an examination reduced into writing, and subscribed, and returned by the justice,[6] in conformity with the Indictable Offences Act, 1848,[7] in England, or the corresponding Act in Ireland.

§ 400. Parol evidence of what was said by a prisoner before a

R. *v.* Dillon, 1877, 14 Cox, C. C. 4.

[2] Thomas *v.* Ansley, 1807, 6 Esp. 80; R. *v.* Page, 1788, 6 Esp. 83; as explained in Whitaker *v.* Wisbey, 1852, 21 L. J. C. P. 116, cited ante, § 85.

[3] Olive *v.* Gwin, 1658, 2 Sid. 146; R. *v.* Browne, 1829, M. & M. 319.

[4] R. *v.* Phillips, 1818, R. & R. 369.

[5] Leach *v.* Simpson, 1839, 5 M. & W. 309, post, § 416. But in R. *v.* Coll, 1889, 24 L. R. Ir. 522, the judge at the trial, having rejected a deposition which he ought to have received, appears to have afterwards set the matter right by the reception of oral evidence from a witness of what he said he had also sworn on the same day, and the majority of the Irish Court of Criminal Appeal sanctioned his action. The refinement by which it was supported was that for all that appeared the witness was speaking of a separate sworn information which had not been reduced into writing.

This rule is subject to the qualification that if a witness whose evidence has been taken out of court under Ord. XXXVII. rr. 1 and 5, is available at the time of the trial, he must be called.

[6] R. *v.* Fearshire, 1779, 1 Lea. 202; R. *v.* Jacobs, 1784, 1 Lea. 309. See post, § 893 et seq.

[7] 11 & 12 V. c. 42; 14 & 15 V. c. 93, Ir.

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magistrate is however admissible if the written examination be excluded for informality,[1]—other than for having been a confession taken on oath, and therefore not voluntary,[2]—or if it be clearly proved [3] that the statement was not reduced into writing. So it may also, if the prisoner was examined on two occasions, or with reference to two offences, and the examination, signed by the magistrates, relates only to what occurred on one occasion,[4] or with respect to one offence,[5] as to statements made by the prisoner in that part of the inquiry not included in the written examination. In like manner, if a witness, having given a written deposition in a cause, has afterwards testified orally in court, parol evidence may, in the event of his death, be given of his vivâ voce testimony, notwithstanding the existence of the deposition;[6] for, in this last case, as two independent sources of information exist, the party who relies on the evidence may, at his discretion, have recourse to either. In all these cases the parol evidence is offered, not in substitution for that of the official document, since no such document exists, but as the best evidence which the circumstances admit of.

§ 401.[7] The *second* class of cases[8] falling within the rule requiring the contents of a document to be proved by the document itself if its production be possible consists of those in which *the parties have of themselves chosen to put their contract into writing.* Here also oral proof cannot be substituted for the *written evidence.* The written instrument may indeed be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and has tacitly been treated by the parties themselves as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is

[1] R. *v.* Reed, 1829, M. & M. 403; R. *v.* Christopher, 1849, 2 C. & K. 994; post, § 416.

[2] R. *v.* Wheeley, 1838, 8 C. & P. 250; R. *v.* Rivers, 1835, 7 C. & P. 177.

[3] But in Parsons *v.* Brown, 1852, 3 C. & K. 295, Jervis, C.J., held that the court could not, in the absence of positive evidence, let in parol evidence by *presuming* that examinations before justices on a charge of felony were not taken down in writing; but see R. *v.* Coll, 1889, 24 L. R. Ir. 522, cited ante, § 399, n. [5].

[4] R. *v.* Wilkinson, 1838, 8 C. & P. 662; R. *v.* Christopher, 1849, 2 C. & K. 994. See also R. *v.* Coll (Ir.), supra.

[5] R. *v.* Harris, 1832, 1 Moo. C. C. 338.

[6] Tod *v.* E. of Winchelsea, 1828, 3 C. & P. 387.

[7] Gr. Ev. § 87, in part.

[8] See supra, § 398.

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§§ 401, 402.

of the very essence of the transaction;[1] and consequently, in all proceedings, civil or criminal, in which the issue depends in any degree upon the terms of a contract, the party whose witnesses show that it was reduced to writing must either produce the instrument, or give some good reason for not doing so. Thus, for example, if in an action to recover land against a tenant holding over, or in an action for the use and occupation of real estate, it should appear, either on the direct or cross-examination of the plaintiff's witnesses, that a written contract of tenancy has been signed, plaintiff must either produce it, or account for its absence;[2] and in an action by landlord against tenant for rent and non-repair, if it should appear that the parties had agreed by parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and a stranger, a nonsuit would be directed, unless this lease could be produced.[3]

§ 402. The same strictness prevails where the question at issue is simply what amount of rent was reserved by the landlord,[4] or who was the actual party to whom a demise had been made,[5] or under whom the tenant came into possession.[6] It has also

[1] See R. *v.* Castle Morton, 1820, 3 B. & Ald. 590. Domat thus explains the principles on which a document is deemed part of the essence of any transaction, and consequently the best or primary proof of it:—"The force of written proof consists in this: men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with a view of laying down a rule for their own guidance, or in order to have, in the instrument, a lasting proof of the truth of what is written. Thus contracts are written, in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law as to what has been agreed on. So testaments are written, in order to preserve the remembrance of what the party, who has a right to dispose of his property, has ordained concerning it, and thereby to lay down a rule for the guidance of his heir and legatees. On the same principle are reduced into writing all sentences, judgments, edicts, ordinances and other matters, which either confer title, or have the force of law. The writing preserves unchanged the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves, that is, by the inspection of the originals:" Domat's Civ. Law, Liv. 3, tit. 6, § 2.

[2] Brewer *v.* Palmer, 1800, 3 Esp. 213; Fenn *v.* Griffith, 1830, 6 Bing. 533; Henry *v.* M. of Westmeath, 1843, Ir. Cir. R. 809; Thunder *v.* Warren, 1845, 8 Ir. Law R. 181; Rudge *v.* M'Carthy, 1841, 4 Ir. Law R. 161.

[3] Turner *v.* Power, 1828, 7 B. & C. 625.

[4] R. *v.* Merthyr Tidvil, 1830, 1 B. & Ad. 29; Augustien *v.* Challis, 1847, 17 L. J. Ex. 73, where Alderson, B., observes, "You may prove by parol the relation of landlord and tenant, but without the lease you cannot tell whether any rent was due."

[5] R. *v.* Rawden, 1828, 8 B. & C. 708.

[6] Doe *v.* Harvey, 1832, 8 Bing. 239.

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several times been held that, in an action for *extra* work done beyond the contract, if it appeared that the work was commenced under an agreement in writing, in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was in fact done under a distinct order, the plaintiff is bound to produce the original document, since it may furnish evidence, not only that the items sought to be recovered were not included therein, but also of the rate of remuneration upon which the parties had agreed.[1] On like principles, where an auctioneer delivered to a bidder, to whom lands were let by auction, a written paper *signed by himself*, containing the terms of the lease, in an action for use and occupation, the landlord was held bound to produce this paper duly stamped as a memorandum of an agreement.[2]

§ 403. Similarly, where[3] the plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which, having accepted the situation and entered upon its duties, the plaintiff during his service had the care, and on the society being afterwards dissolved sued some of the members of the committee of the society for his salary, it was held that he was bound to produce the book under which he was engaged. It is doubtful whether, in an action for an injury done to the plaintiff's reversion, his interest as reversioner may be proved by the parol testimony of the tenant, when it appears that the premises are occupied under a written agreement.[4]

§ 404. On principle, in cases of this kind, the fact that the writing is in the possession of the adverse party does not change its character; it is still the primary evidence of the contract;

[1] Vincent *v.* Cole, 1828, M. & M. 258; Buxton *v.* Cornish, 1844, 13 L. J. Ex. 91; Jones *v.* Howell, 1835, 4 Dowl. 176; Holbard *v.* Stephens, 1841, 5 Jur. 71; Parton *v.* Cole, 1842, 6 Jur. 370. See Reid *v.* Batte, 1829, M. & M. 414, cited post, § 405; and Edie *v.* Kingsford, 1854, 23 L. J. C. P. 123.

[2] Ramsbottom *v.* Mortley, 1814, 2 M. & Selw. 445. See Ramsbottom *v.* Tunbridge, 1814, 2 M. & Selw. 434, cited post, § 406. See, also, Hawkins *v.* Warre, 1825, 3 B. & C. 697, where Abbott, C.J., draws the distinction between papers signed by the parties or their agents and those which are unsigned.

[3] Whitford *v.* Tutin, 1834, 4 L. J. K. B. 53.

[4] Cotterill *v.* Hobby, 1825, 4 B. & C. 465, holding that the agreement must be produced (which seems correct), and Strother *v.* Barr, 1828, 2 M. & P. 207, where the judges were equally divided.

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§§ 404, 405.

and its absence must be accounted for by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received. But in all such cases, if the plaintiff can establish a primâ facie case, without betraying the existence of a written contract relating to the subject-matter of the action, he will not be precluded from recovering by the defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence,[1] and in the event of its turning out to be unstamped, or insufficiently stamped, he must pay the duty and penalty[2]—and this even though a notice to produce the document has been served on the plaintiff.[3] In practice what usually happens is that, so soon as the plaintiff begins to give parol evidence of an agreement which the defendant knows to be in writing, objection is taken by the defendant, and the plaintiff is forced by the judge to produce the agreement under penalty of having the parol evidence excluded. It has been held in an action of ejectment that the plaintiff cannot be forced to produce a written agreement merely because one of his witnesses proved, on cross-examination, that an agreement, which he only knew *related in some way to the land in question*, was seen on that morning in the hands of the plaintiff's solicitor, and was produced at a former trial between the same parties, since, to exclude parol evidence of the tenancy, it should appear (which it did not) that the agreement was between the same parties, and was binding at the time of the second trial.[4]

§ 405.[5] Moreover, a written communication or agreement between the parties which is *collateral* to the question in issue need not be produced. For example, plaintiff can recover without producing the original written agreement, if during an employment under a written contract a verbal order is given for separate work, if he can show distinctly that the items, for which he seeks remuneration, were not included therein; as, for

[1] Magnay *v.* Knight, 1840, 2 Scott, N. R. 64; Stephens *v.* Pinney, 1818, 8 Taunt. 327; Marston *v.* Dean, 1835, 7 C. & P. 13; Fry *v.* Chapman, 1836, 5 Dowl. P. C. 265; R. *v.* Padstow, 1832, 4 B. & Ad. 208; Reed *v.* Deere, 1827, 7 B. & C. 261.

[2] Ante, § 397.

[3] See cases cited in n. [1], supra.

[4] Doe *v.* Morris, 1810, 12 East, 237.

[5] Gr. Ev. § 89, in part.

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instance, that whilst certain work was in progress in the *inside* of a house under a written agreement, a verbal order was given to execute some alterations or improvements on the *outside*.[1] So, also, *the fact* of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing.[2] Thus, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing;[3] where a tenant holds lands under written rules, but the length of his term has been agreed orally, these rules need not be produced in an action of trespass where the defendant denies the tenant's possession, because it is only necessary to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rules;[4] the fact of partnership may be proved by parol evidence of the acts of the parties, without producing the deed;[5] and the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing.[6]

§ 406. Parol evidence will be admissible when the writing only amounted either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the court or jury, and could not, by any sensible rule of interpretation, be construed as memoranda which the parties themselves intended to operate as fit evidence of their several agreements. Thus, it has been admitted where, at the time of letting premises

[1] Reid *v.* Batte, 1829, M. & M. 414; commented on by Patteson, J., in Parton *v.* Cole, 1842, 6 Jur. 370. See Vincent *v.* Cole, 1828, M. & M. 258, and cases cited ante, § 402, n. [1].

[2] See dictum of Alderson, B., and other cases cited in next note.

[3] R. *v.* Holy Trinity, Hull, 1827, 7 B. & C. 611; Doe *v.* Harvey, 1832, 8 Bing. 239; Spiers *v.* Willison, 1808, 4 Cranch, 398 (Am); Dennett *v.* Crocker, 1832, 8 Greenl. 239 (Am.). See, however, the observations of Best, C.J., on R. *v.* Holy Trinity, in Strother *v.* Barr, 1828, 2 M. & P. 207; see, also, Twynam *v.* Knowles, 1853, 22 L. J. C. P. 143; Augustien *v.* Challis, 1847, 17 L. J. Ex. 73, cited ante, § 402.

[4] Hey *v.* Moorhouse, 1839, 6 Bing. N. C. 52.

[5] Alderson *v.* Clay, 1816, 1 Stark. R. 405.

[6] Whitfield *v.* Brand, 1847, 16 L. J. Ex. 103.

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§§ 406, 407. to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes;[1] where, upon a like occasion, a memorandum of agreement had been drawn up by the landlord's bailiff, the terms of which were read over, and assented to, by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so;[2] where, in order to avoid mistakes, the terms upon which a house was let were, at the time of letting, reduced to writing by the lessor's agent, and in his absence signed by the lessee's wife, in order to bind him, and the lessee himself afterwards entered upon and occupied the premises but did not otherwise appear to have constituted the wife as his agent, or to have recognised her act;[3] where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but was never signed either by the auctioneer or by the parties;[4] and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the paper, nor did it appear to have been read to them.[5]

§ 407. Where, too, an action is not directly upon an agreement and for non-performance of its terms, but is in tort, for the conversion, or detention, or negligent loss of the writing containing such agreement, plaintiff may give parol evidence, descriptive of its identity, without giving notice to the defendant to produce the document itself.[6] Moreover, even though the defendant be

[1] Trewhitt *v.* Lambert, 1839, 10 A. & E. 470. See Drant *v.* Brown, 1825, 3 B. & C. 665; and Bethel *v.* Blencowe, 1841, 10 L. J. C. P. 243, where it was held that written proposals, made pending a negotiation for a tenancy, might be admitted without a stamp, as proving one step in the evidence of the contract.

[2] Doe *v.* Cartwright, 1820, 3 B. & Ald. 326. See Hawkins *v.* Warre, 1825, 3 B. & C. 697.

[3] R. *v.* St. Martin's, Leicester, 1834, 2 A. & E. 210.

[4] Ramsbottom *v.* Tunbridge, 1814, 2 M. & Selw. 434. See Ramsbottom *v.* Mortley, 1814, 2 M. & Selw. 445, cited ante, § 402.

[5] R. *v.* Wrangle, 1835, 2 A. & E. 514. See, for other instances, Ingram *v.* Lea, 1810, 2 Camp. 521; Dalison *v.* Stark, 1803, 4 Esp. 163; Wilson *v.* Bowie, 1823, 1 C. & P. 10. As to the admissibility of evidence tending to show the existence of a parol agreement collateral to a written one, see post, §§ 1135 and 1147.

[6] Scott *v.* Jones, 1813, 4 Taunt. 865; How *v.* Hall, 1811, 14 East, 274; Bucher *v.* Jarratt, 1802, 3 Bos. & P. 143; Read *v.* Gamble, 1839, 10 A. & E. 597, n.; Ross *v.* Bruce,

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willing to produce such document without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he think fit, as part of his own case.[1] For, as has been observed, for the purpose of identification, no distinction can be drawn between written instruments and other articles; between trover for a promissory note, and trover for a waggon and horses.[2]

§ 408. A similar rule prevails in criminal cases. For example, if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though no notice to produce it has been served on the prisoner or his agent.[3] On an indictment for forgery, however, if the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his solicitor with a notice to produce it, before he can offer secondary evidence of its contents.[4]

§ 409.[5] The *third* class of cases[6] falling within the rule that a written document can only be proved by the instrument itself, embraces *every writing* not falling within the two classes already discussed, as to *the existence or contents of which there is a dispute*, and which is *material to the issue* between the parties, and which is not a mere memorandum of some other fact. Thus, to take

1803, 1 Day, 100 (Am.); The People *v.* Holbrook, 1816, 13 Johns. 90 (Am.); M'Lean *v.* Hertzog, 1820, 6 Serg. & R. 154 (Am.). These cases overrule Cowan *v.* Abrahams, 1793, 1 Esp. 50.

[1] Whitehead *v.* Scott, 1830, 1 M. & Rob. 2.

[2] Jolley *v.* Taylor, 1807, 1 Camp. 143.

[3] R. *v.* Aickles, 1784, 1 Lea. 294, 297, n., 300, n.

[4] R. *v.* Haworth, 1830, 4 C. & P. 254; R. *v.* Fitzsimons, 1869, Ir. R. 4 C. L. 1. Several grounds for this difference between larceny and forgery may be suggested. One is, that under the old law (see now 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 42, cited ante, § 291) it was always sufficient, on charges of larceny, to both in the indictment and the proof describe a *stolen* instrument in very general terms, whereas, in the case of *forgery*, the prosecutor was often required to enter into a minute description of the document alleged to have been forged (Bucher *v.* Jarratt, (1802, 3 B. & P. 146). A second is, that a person charged with stealing an instrument must know, from the very nature of the accusation, that he will be called upon to produce it, while an indictment for forgery furnishes no such intimation; and it will be presently seen, when the rules which regulate the serving of notices to produce are discussed (post, § 452), that this is a material distinction. A third (and very substantial) one is that, where the charge is one of larceny, it is highly improbable that anything material will turn either upon the contents of, or a minute description of, the instrument itself, whereas on a charge of forgery the exact opposite is the case, and an examination of the instrument itself may very probably prove of the highest importance.

[5] Gr. Ev. § 88, in part.

[6] See supra, § 398.

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§§ 409—411. some common examples, newspapers and account-books are the best evidence of their own contents, and therefore a witness cannot be asked whether certain resolutions were published in the newspapers;[1] neither can he be questioned as to the contents of his account-books when he has not brought them with him.[2] The primary proof of the publication of an opera is the production of the printed music, and consequently the fact of publication cannot be proved in the first instance by a witness who has merely seen the opera in print, or heard parts of it played in society.[3] The fact of a person being rated to the relief of the poor can only be legally proved by the rate-book itself,[4] or at least a certified or examined copy from it,[5] and it therefore cannot be shown by the collector stating that such person's name was on the rate;[6] neither can a plaintiff be asked on cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book itself.[6] Having regard to these principles, it is very doubtful whether the contents of handbills written or dictated at a meeting of conspirators can be proved by oral testimony.[7]

§§ 410–11. When it is stated that oral testimony cannot be substituted for any writing included in either of the three classes above mentioned, a tacit *exception* must, perhaps, be made in favour of the parol *admissions* of a party, and of his *acts amounting to admissions*. A party's *admissions*, and *acts amounting to admissions*, are primary proof against himself and those claiming under him, even where they relate to the contents of a deed or other instrument, which are directly in issue in the cause.[8] It is said that the reason why such statements or acts

[1] R. *v.* O'Connell, 1843-4, Arm. & T. 163 (Ir.).

[2] See post, § 462.

[3] Boosey *v.* Davidson, 1849, 18 L. J. Q. B. 174. But see Geralopulo *v.* Wieler, 1851, 20 L. J. C. P. 105.

[4] R. *v.* Coppull, 1801, 2 East, 25, recognised in R. *v.* Staple Fitzpaine, 1842, 2 Q. B. 494. See "The Poor Rate Assessment and Collection Act, 1869," 32 & 33 V. c. 41, § 18, cited ante, § 147 A.

[5] Justice *v.* Elstob, 1858, 1 F. & F. 256.

[6] Darby *v.* Ouseley, 1856, 25 L. J. Ex. 227.

[7] R. *v.* Thistlewood, 1820, 33 How. St. Tr. 691. See post, § 417.

[8] Earle *v.* Picken, 1833, 5 C. & P. 542; Newhall *v.* Holt, 1840, 6 M. & W. 662; Slatterie *v.* Pooley, 1840, 10 L. J. Ex. 8; Bethell *v.* Blencowe, 1841, 10 L. J. C. P. 243; Howard *v.* Smith, 1841, 3 M. & Gr. 254; R. *v.* Welch, 1846, 2 C. & K. 296; King

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are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so.[1]

§ 412. Since some observations in the last footnote dealing with the above reasons were written, the judges in Ireland[2] have

v. Cole, 1848, 17 L. J. Ex. 283; R. *v.* Basingstoke, 1851, 19 L. J. M. C. 28; Boulter *v.* Peplow, 1850, 19 L. J. C. P. 191. These cases overrule Lord Tenterden's decision in Bloxham *v.* Elsee, 1825, 1 C. & P. 558. See Fox *v.* Walters, 1840, 12 A. & E. 43.

[1] Slatterie *v.* Pooley, 1840, 10 L. J. Ex. 8. Although the admission of a party may fairly be presumed to be true, the parol evidence by which that admission is proved need by no means be so; and, indeed, such testimony is open to even greater objection than applies to the ordinary case, where secondary evidence is produced, and the best evidence is withheld. When the admission is made in court, it may very reasonably be allowed to render needless the production of the written instrument to which it refers, because the simple question in such case will be, Is the admission true? and the rational presumption is, that a man will not tell a falsehood which is against his own interest. But when a witness is called to say that he has heard the opposite party make a certain statement with respect to the contents of a written instrument, the further question arises, Was this statement really made? and to permit such parol evidence to be equally admissible, in proof of the contents of the instrument, with the production of the instrument itself, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed, if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. Lord Tenterden and Mr. Justice Maule have emphatically expressed opinions in support of the view here suggested (see Bloxam *v.* Elsee, 1825, 1 C. & P. 538; Boulter *v.* Peplow, 1850, 19 L. J. C. P. 191); while Parke, B., himself has declared that the parol evidence of admissions may, in some cases, be quite unsatisfactory to a jury (Slatterie *v.* Pooley, 1840, 10 L. J. Ex. 8); and that too great weight ought never to be attached to such evidence, since it frequently happens that the witness not only has misunderstood what the party has said, but, by unintentionally altering a few of the expressions really used, has given to the statement an effect completely at variance with what was intended. See note to Earle *v.* Picken, 1833, 5 C. & P. 542. Moreover, as the reporter observes in the report of Boulton *v.* Peplow, 1850, 9 C. B. 501, n. *c*, "according to Slatterie *v.* Pooley, what A. states as to what B., a party, has said respecting the contents of a document which B. has seen, is admissible, whilst what A. states, respecting a document which he himself has seen, is not admissible,—although in the latter case, the chance of error is single, in the former double."

[2] Lawless *v.* Queale, 1845, 8 Ir. L. R. 382. The case which called for the remarks cited above was an action for use and occupation. At the trial, one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant,

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§§ 412—414.

declared their disapproval of the principles which such reasons embody. "The doctrine that parol admissions can prove the contents of written documents is," said Pennefather, C.J., "a most dangerous proposition; by it a man might be deprived of an estate of 10,000*l.* per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise encumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

§ 413. In any case it is doubtful whether (even assuming it to be established) the doctrine allowing admissions by parol to sufficiently prove a written document extends to records, as well as to deeds and ordinary writings, and whether it would embrace the case of a *confessio juris*, as well as that of a *confessio facti*. On the one hand, the admission of a party that he had been discharged under the Insolvent Debtors Act, was held insufficient evidence of a valid discharge, because the judicial document, on being produced, might be found irregular and void, and the party might be mistaken.[1] On the other hand, on an indictment for bigamy, the prisoner's deliberate declaration, that he had been married in a foreign country was held to render it unnecessary to prove that the marriage had been celebrated according to the laws of that country;[2] and in an action for wages, an admission by plaintiff that his claim had been referred to an arbitrator, who had made an award against him, was held admissible evidence on behalf of the defendant.[3]

§ 414. A material difference exists between proving by an

acknowledged in cross-examination the existence of a written agreement; and the court held, that this agreement must be produced, though the defendant had admitted that he was tenant at a particular rent. See, also, Ld. Gosford *v.* Robb, 1845, 8 Ir. L. R. 217; Parsons *v.* Purcell, 1849, 12 Ir. L. R. 90; and Henman *v.* Lester, 1862, 31 L. J. C. P. 370.

[1] Scott *v.* Clare, 1812, 3 Camp. 236. See, also, Summersett *v.* Adamson, 1822, 1 Bing. 73; Jenner *v.* Jolliffe, 1810, 6 Johns. 9 (Am.); Welland Canal Co. *v.* Hathaway, 1832, 8 Wend. 480 (Am.).

[2] R. *v.* Newton, 1843, 2 M. & Rob. 503. But see R. *v.* Flaherty, 1847, 2 C. & K. 782; and R. *v.* Savage, 1876, 13 Cox, C. C. 178.

[3] Murray *v.* Gregory, 1850, 19 L. J. Ex. 355.

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admission the execution of an instrument requiring attestation, which is produced, and proving the party's admission, that by such and such instrument, which is not produced, a certain act was done. It will hereafter be shown,[1] that when an instrument, which requires attestation to give it validity,[2] is in court, and its execution is to be proved against a hostile party, an admission on his part of due execution, unless made with a view to the trial of that cause, is generally[3] not sufficient.

§ 415.[4] Where a writing does not fall within either of the three classes already described, no reason exists why it should exclude oral evidence. For instance, if a written communication be *accompanied* by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it;[5] the payment of money may be proved by oral testimony, though a receipt be taken;[6] a verbal demand of goods may be shown, though a demand in writing was made at the same time;[7] the admission of a debt is provable by oral testimony, though a written promise to pay was simultaneously given;[8] and the determination of an interest in land, whether freehold or copyhold, may be proved without producing, or accounting for the non-production of, the title-deeds or court rolls, but merely showing that a deceased occupier had, while in possession, declared that his interest in the premises would expire at his death,[9] since,—as will presently be seen,[10]—all statements by a person, while in possession of property, are, after his death, in themselves primary evidence, if they tend to cut down his interest therein.[11]

§ 416. In the same way, oral evidence of what then passed will be equally as admissible as the clerk's note, where, on a preliminary hearing of a charge, the magistrate's clerk takes down what the witness says, but neither the witness nor the magistrate signs the writing, and it does not constitute part of

[1] See post, §§ 1843, 1849.
[2] See 28 & 29 V. c. 18, § 7.
[3] See, however, Nagle *v.* Shea, 1875, Ir. R. 9 C. L. 389.
[4] Gr. Ev. § 90, in part.
[5] See ante, § 400.
[6] Rambert *v.* Cohen, 1803, 4 Esp. 213; Jacob *v.* Lindsay, 1801, 1 East, 460.
[7] Smith *v.* Young, 1808, 1 Camp. 439.
[8] Singleton *v.* Barrett, 1832, 1 L. J. Ex. 134.
[9] Doe *v.* Langfield, 1847, 16 M. & W. 497.
[10] Post, § 684 et seq.
[11] Doe *v.* Langfield, 1847, 16 M. & W. 514.

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§ 416. the depositions returned:[1] or if, on the hearing of an information for a trespass in pursuit of game,[2] the clerk takes a note of the charge; because this is not one of those cases where the magistrate is bound to take down what the witnesses say;[3] or if in support of an indictment for perjury committed in a county court, without production of the judge's note, the perjury be proved by any witness who was then present, if the case was one in which the law does not require the judge to take any note.[4] Similarly, too, what passed at a meeting where the proceedings of directors, commissioners, public trustees, and the like, are voluntarily entered in books, may be proved by parol, because the fact that such books are rendered by statute admissible in evidence does not exclude verbal proof of what has taken place.[5] On like grounds, it is not necessary to produce a certificate of registration in order to prove that a joint stock company has been completely registered.[6] The fact of birth, baptism, marriage,[7] death or burial, may, for the same reason, be proved by parol testimony, for though the law requires a narrative or memorandum of these events to be entered in registers, the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may be used to furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence,[8] while the non-production of a minute book or

[1] Jeans *v.* Wheedon, 1843, 2 M. & Rob. 486 (Cresswell, J.); R. *v.* Christopher, 1849, 2 C. & K. 994; ante, § 400.

[2] Under 1 & 2 W. 4, c. 32 ("The Game Act, 1831"), § 30.

[3] Robinson *v.* Vaughton, 1838, 8 C. & P. 252.

[4] R. *v.* Morgan, 1852, 6 Cox, C. C. 107; Harmer *v.* Bean, 1853, 3 C. & K. 307. A county court judge is now bound by § 120 of the County Courts Act, 1888 (51 & 52 V. c. 43), at the trial or hearing of any action or matter in which there is a right of appeal, at the request of either party to "make a note of any question of law raised at the trial or hearing, and of the facts in evidence in relation thereto." In the absence of a request, the statute does not require him to take a note.

[5] Miles *v.* Bough, 1842, 12 L. J. Q. B. 74; Inglis *v.* Gt. North. Ry. Co., 1852, 1 Macq. 112 (H. L.).

[6] Agricultural Cattle Ins. Co. *v.* Fitzgerald, 1851, 20 L. J. Q. B. 244. decided under the repealed Act. 7 & 8 V. c. 110, §§ 7, 25. See, now, 63 & 64 V. c. 48, § 1. See, also, R. *v.* Langton, 1877, 2 Q. B. D. 296.

[7] Lady Limerick *v.* Ld. Limerick. 1862, 32 L. J. P. & M. 22.

[8] Evans *v.* Morgan, 1832, 2 C. & J. 453; R. *v.* Allison, 1806, R. & R. 109; Harrison *v.* Corp. of Southampton, 1853, 22 L. J. Ch. 722; R. *v.* Mainwaring, 1856, 26 L. J. M. C. 10; Reed *v.* Passer, 1794, Peake, R. 232; St. Devereux *v.* Much Dew Church, 1761-2, 1 W. Bl. 367; Morris *v.* Miller, 1766-7, 4 Burr.

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§§ 416—418.

register at most does no more than afford grounds for scrutinising such evidence with more than usual care. The *fact* that a picture is an infringement of the copyright in another picture may, too, be proved in an action for infringement of copyright without producing the original picture.[1] It is also every-day practice to prove the fact that writing is very like that of a named person without producing any of that person's writing.

§ 417.[2] The principle under consideration, though hitherto only illustrated by examples drawn from *civil* cases, also applies in *criminal* ones. Accordingly, on prosecutions for political offences, such as treason, conspiracy, and sedition, the *inscriptions* on flags and banners paraded in public, and the contents of *resolutions* read at a public meeting, may be proved, as being of the nature of speeches, by oral testimony.[3] Where, too, a party was indicted for administering an unlawful oath, a witness was permitted to give parol evidence of the words used, though he stated his belief that the accused read the words from a paper, which he held in his hand when he administered the oath, and no notice to produce this paper had been served on the prisoner.[4]

§ 418. The rule of law that *the best evidence* which the nature of each case permits must always be produced, has thus far been discussed as to its effect in forbidding *oral* evidence being substituted for written evidence. But the same rule of law sometimes excludes *writings which the law considers as entitled to less weight* than those which might be forthcoming. The original of a document must always (with a few exceptions that will be presently mentioned[5]) be produced, and a mere *copy*, however accurate, will not be, in the first instance, admissible.[6] For instance, on an indictment for feloniously setting fire to a house, with intent to defraud the insurers, the policy itself, being the best evidence

2057; Birt *v.* Barlow, 1779, 1 Doug. 171, 174; Com. *v.* Norcross, 1813, 9 Mass. 492 (Am.); Ellis *v.* Ellis, 1814, 11 Mass. 92 (Am.); Owings *v.* Wyant, 1795, 1 Har. & M'H. 393 (Am.).

[1] Lucas *v.* Williams, [1892] 2 Q. B. 113 (C. A.).

[2] Gr. Ev. § 90, in part.

[3] R. *v.* Hunt, 1820, 3 B. & Ald. 566; Sheridan's and Kirwan's case, 1811, 25 Ch. D. 373; R. *v.* O'Connell, 1843-4, Arm. & T. 163 (Ir.). See ante, § 409, and cases cited in notes.

[4] R. *v.* Moors, 1801, 6 East, 421, n.

[5] Post, § 428.

[6] B. N. P. 293, 294.

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§§ 418, 419.

of the fact of insurance, must be produced by the prosecutor; and recourse cannot be had either to parol evidence that the premises were insured, or to the books of the insurance office, unless notice to produce the policy itself has been duly served upon the defendant, as this ought to be, and usually is, in his possession.[1] If, too, it be necessary to show the contents of a manuscript which is in the possession of the opposite party, a paper, purporting to be a printed copy, cannot be received in evidence, without a notice to produce the manuscript.[2] The question as to what is or is not an original is sometimes raised. On this point it is settled that, on the one hand, a duplicate writing, taken from an autograph at one impression by means of a copying machine cannot be regarded as an original, but the autograph itself must be produced, or its non-production be accounted for as in ordinary cases.[3] On the other hand, all printed copies struck off in one common impression, though they constitute merely secondary evidence of the contents of the paper from which they are taken, are primary evidence of each other's contents.[4]

§ 419. The memorial of a registered conveyance is primary evidence[5] to prove the contents of a deed against the party by whom the deed is registered, and those who claim under him, being considered in the light of an admission,[6] and is at the very least, as against such persons, good secondary[7] evidence. As against third persons, however, it is certainly inadmissible as primary evidence.[8] On one or two occasions, indeed, such

[1] R. *v.* Doran, 1791, 1 Esp. 127; R. *v.* Kitson, 1853, 22 L. J. M. C. 118; R. *v.* Gilson, 1807, R. & R. 138; R. *v.* Ellicombe, 1833, 5 C. & P. 522.

[2] R. *v.* Watson, 1817, 2 Stark. R. 139; Dwyer *v.* Collins, 1852, 7 Ex. 639.

[3] Nodin *v.* Murray, 1812, 3 Camp. 228. In India, "an impression of a document made by a copying machine shall be taken without further proof to be a correct copy." Act 11 of 1855, § 35.

[4] R. *v.* Watson, 1817, 2 Stark. R. 139, where the question was, whether a prisoner was acquainted with the contents of certain placards, some copies of which were traced to his possession, and a copy remaining with the printer was allowed to be read in evidence for the prosecution, though no notice had been served upon the prisoner to produce the copies which had been delivered to him.

[5] Boulter *v.* Peplow, 1850, 19 L. J. C. P. 191. See Brown *v.* Armstrong, 1873, 7 Ir. C. L. R. 130.

[6] Wollaston *v.* Hakewill, 1841, 10 L. J. C. P. 303.

[7] Doe *v.* Clifford, 1847, 2 C. & K. 448; D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146.

[8] Molton *v.* Harris, 1797, 2 Esp. 549.

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memorial, or even an examined copy of the registry, has, under special circumstances, been received as secondary evidence of the contents of an indenture, not only as against parties to the deed, who have had no part in registering it, but also as against third persons.[1] The enrolment of a lease granted by the Crown is primary evidence, because the possessions of the Crown cannot be alienated but by matter of record; and so also are memorials of leases granted by the Duke of Cornwall, on account of the identity of interest which subsists between his Royal Highness and the Crown.[2]

§ 420. Occasionally it is a question of some nicety to determine what instrument constitutes the primary evidence of a transaction. For instance, it has been discussed what is the primary evidence of the transaction where goods have been sold through the medium of a broker. Some have said that the *broker's book*, if signed by the broker, is the primary evidence of the transaction, and consequently, in the first instance, the only admissible proof of the contract.[3] On the other hand, it has, after much consideration, and after consulting merchants, been held that the *bought and sold notes*, provided they agree, and are signed so as to satisfy the Statute of Frauds,[4] constitute the contract, and, as such, must be produced in the first instance.[5] It is at least quite clear, that if no notes have been transmitted to the principals, recourse may be had to the signed entry in the book kept by the broker,[6] or, indeed, to any other memorandum

[1] See Sadlier *v.* Biggs, 1853, 4 H. L. C. 435; Biggs *v.* Sadlier, 1847, 10 Ir. Eq. R. 522; Peyton *v.* M'Dermott, 1837, 1 Dr. & Wal. 198 (Ir.). See, also, Collins *v.* Maule, 1838, 8 C. & P. 502; Doe *v.* Kilner, 1826, 2 C. & P. 289. In all these cases, however, either the parties had been acting for a long period in obedience to the provisions of the supposed instrument, or the deed had been recited or referred to in other documents admissible in the cause.

[2] Rowe *v.* Brenton, 1828, 8 B. & C. 737. For other instances, see post, § 1650 et seq.

[3] Sievewright *v.* Archibald, 1851, 20 L. J. Q. B. 529; Heyman *v.* Neale, 1809, 2 Camp. 337; Grant *v.* Fletcher, 1826, 5 B. & C. 436; Henderson *v.* Barnewall, 1827, 1 Y. & J. 387.

[4] Durrell *v.* Evans, 1861, 31 L. J. Ex. 337. See Parton *v.* Crofts, 1864, 33 L. J. C. P. 189; and Thompson *v.* Gardiner, 1876, 1 C. P. D. 777. In these last two cases the production of the sold note only was held sufficient to satisfy the statute.

[5] Goom *v.* Aflalo, 1826, 6 B. & C. 177; Thornton *v.* Kempster, 1814, 5 Taunt. 786; Thornton *v.* Meux, 1827, M. & M. 43; Cumming *v.* Roebuck, 1816, Holt, N. P. 172; Hawes *v.* Forster, 1834, 1 M. & Rob. 368; Townend *v.* Drakeford, 1843, 1 C. & K. 20.

[6] Townend *v.* Drakeford, 1843, 1

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§§ 420—423.

made by him as agent for both parties, which is sufficient to satisfy the statute.[1] But if even a single note, actually *signed* by one party, has been delivered to the other party, this note has been held to itself constitute the contract, even though it differed materially from the note which was sent to the party signing that originally produced by the plaintiff.[2] Where the bought and sold notes are signed by the broker, and it is affirmatively shown that these substantially differ from each other, no binding contract is usually effected.[3]

§ 421. Whether the broker's book may be resorted to if there be a material disagreement between the bought and sold notes is a very difficult question. Two eminent judges, on three different occasions, held that it could not.[4] But a third, who was no mean lawyer, thought that it could,[5] and it is submitted that his opinion will ultimately prevail.

§ 422. In general, it will be sufficient if a party seeking to enforce a contract made through a broker produces the note in his possession, and shows that the broker was employed in the transaction by his adversary without producing the original broker's book. His adversary, if he rely on any variance between the bought and sold notes, must produce, as his evidence, the one that has been handed to himself.[6]

§ 423. As already indicated,[7] any substantial variance between the bought note and the sold note may prevent there ever having been any contract at all. But the amount of variance that will have this effect cannot be expressly defined. In one case, where the bought note spoke of a brokerage of one per cent., and a deposit of fifteen per cent., and the sold note stated that the

C. & K. 20; Pitts *v.* Beckett, 1845, 14 L. J. Ex. 358; Thompson *v.* Gardiner, 1876, 1 C. P. D. 777.

Richey *v.* Garvey, 1847, 10 Ir. L. R. 544. There the memorandum had been drawn up two or three days after the sale; but the court held this fact to be immaterial, the broker's authority as agent for the parties not having been revoked.

[2] Rowe *v.* Osborne, 1815, 1 Stark. R. 140.

[3] Cowie *v.* Remfry, 1846, 5 Moo. P. C. C. 232; and see Rowe *v.* Osborne, 1815, 1 Stark. R. 140, recognised in Cowie *v.* Remfry, P. C., supra; and see, also, Moore *v.* Campbell, 1854, 23 L. J. Ex. 310; Heyworth *v.* Knight, 1864, 17 C. B. (N.S.) 298.

[4] Thornton *v.* Charles, 1836, 2 M. & W. 809; Townend *v.* Drakeford, 1843, 1 C. & K. 20; and Gregson *v.* Ruck, 1843, 4 Q. B. 737.

[5] Ld. Wensleydale in Thornton *v.* Charles, 1836, 2 M. & W. 809.

[6] Hawes *v.* Forster, 1834, 1 M. & Rob. 368.

[7] Cowie *v.* Remfry, 1846, 5 Moo. P. C. C. 232; supra, § 420.

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brokerage was ten shillings per cent., and omitted all mention of the deposit, it was ruled that the discrepancy was fatal, though with respect to the brokerage one of the jury interpreted the notes as meaning that the broker should be paid by the buyer one per cent., and by the seller a half per cent.;[1] and a similar conclusion was come to in another case, where Scotch iron was named in the bought note, and Dunlop's iron, which is Scotch iron, but not the only kind of Scotch iron, was specified in the sold note;[2] and in yet a third, in which the sole difference between the bought and the sold notes was, that the one purported to deal with "Riga," and the other with "Petersburg," hemp.[3] But a mere clerical error, or even a mistake in a name, if productive of no loss, will not invalidate the sale.[4]

§ 424. In applying to notarial instruments the general rule that the original document, and not a mere copy of it, must be produced as evidence, it is always considered that a duplicate made out at any time from the original or protocol in the notarial book, is equivalent to an original drawn up at the time of the entry in the book.[5]

§ 425. Primary proof of the title of a person as executor or administrator may, as to grants since the 11th of January, 1858,[6] be proved either by producing the probate or letters, or by an exemplification thereof granted by a registrar or district registrar of the Probate Division of the High Court.[7]

§ 426. The rule as to whether any or which of the copies of deeds executed in duplicate may be regarded as an original, and as to any or which of them are to be regarded as copies, is this:—When two or more parts are sealed and delivered by each

[1] Townend *v.* Drakeford, 1843, 1 C. & K. 20. See Kempson *v.* Boyle, 1865, 34 L. J. Ex. 191, where parol evidence was admitted to explain away an apparent variance between the notes.

[2] Sievewright *v.* Archibald, 1851, 20 L. J. Q. B. 529.

[3] Thornton *v.* Kempster, 1814, 5 Taunt. 786.

[4] Mitchell *v.* Lapage, 1816, Holt, N. P. 253. See Bold *v.* Rayner, 1836, 5 L. J. Ex. 172.

[5] Geralopulo *v.* Wieler, 1851, 20 L. J. C. P. 105.

[6] When the Act of 20 & 21 V. c. 77 ("The Court of Probate Act, 1857") (as now amended by "The Statute Law Revision Act, 1892," 55 & 56 V. c. 19) came into operation. See Gazette of Friday, Dec. 4, 1857.

[7] See forms of exemplifications appended to the Rules, &c., of 1862, for the Registrars of the Court of Probate in respect of non-contentious business, Nos. 10 and 11; and similar forms appended to Rules, &c., for the District Registrars, Nos. 11 and 12. As to proof of probate granted under the old law, see post, § 1589.

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party,—a practice which of late years has frequently prevailed,—they are denominated *duplicate* or triplicate *originals*,[1] and each copy is considered primary evidence.[2] When, however, each part is executed by one party only (as often occurs in the case of leases), the two instruments are called *counterparts*, and each is alternately the best evidence as against the party sealing it, and those in privity with such party,[3] and secondary evidence of the contents of the other part.[4] Thus, if a landlord brings an action for rent, he produces the counterpart executed by the tenant as original evidence,[5] or, in the event of its loss, he may have recourse either to the part sealed by himself, or to any other species of secondary proof of such counterpart;[6] if, however, the tenant is the person aggrieved, he must rely on the part delivered by the landlord, and that executed by himself will only be considered as secondary evidence. For stamp purposes the counterpart sealed by the lessor is usually deemed the original; but that which is sealed by the lessee may be described in pleading as the "indenture," though stamped as a counterpart, provided the action be brought against the lessee.[7] Where any discrepancy is found to exist between a lease and its counterpart, the law will presume that the lease is correct, unless it be clear that the mistake is in that instrument.[8]

§ 427. On one or two occasions, where it was necessary to show that the plaintiff's ancestor had exercised acts of owner-

[1] Note by reporter, 2 M. & Gr. 518 *b*, 1841.

[2] See Colling *v.* Treweek, 1827, 6 B. & C. 398; Brown *v.* Woodman, 1834, 6 C. & P. 206.

[3] Roe *v.* Davis, 1806, 7 East, 363; May. of Carlisle *v.* Blamire, 1807, 8 East, 487; Paul *v.* Meek, 1828, 2 Y. & J. 116; Pearce *v.* Morrice, 1832, 4 L. J. K. B. 21; Burleigh *v.* Stibbs, 1793, 5 T. R. 465; Houghton *v.* Kœnig, 1856, 25 L. J. C. P. 218.

[4] Munn *v.* Godbold, 1825, 3 Bing. 292. As secondary evidence it will be admissible, though unstamped: id. See 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 72; and ante, § 148.

[5] The law in Ireland is now regulated by § 23 of the Act 23 & 24 V. c. 154, which enacts, that "in all actions, suits, and proceedings, proof by or on behalf of any landlord of the perfection of the counterpart of any lease shall be equivalent to proof of the protection of the original lease; and in case it shall appear that no counterpart existed, or that the counterpart has been lost, destroyed, or mislaid, proof of a copy of the original lease or counterpart, as the case may be, shall be sufficient evidence of the contents of the lease, as against the lessee, or any person claiming from or under him."

[6] Doe *v.* Ross, 1840, 10 L. J. Ex. 201; Hall *v.* Ball, 1841, 10 L. J. C. P. 285.

[7] Pearce *v.* Morrice, 1832, 4 L. J. K. B. 21.

[8] Burchell *v.* Clark, 1876, 2 C. P. D. 88.

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ship over the property in question, counterparts of leases older than the period of living memory, and found in the ancestor's muniment room, have been admitted in evidence even against strangers, though executed by no one but the persons named as lessees, who were not shown to have actually held under them, and though no excuse was given for not producing the original leases sealed by the ancestor.[1] It is difficult to reconcile these decisions with strict principle, since the counterparts amounted, in fact, to no more than admissions by third parties that the ancestor was seised; but the rule was apparently relaxed in consequence of the acknowledged difficulty of tracing acts of ownership after the lapse of many years.

§ 428. The rule which requires the production of the best attainable evidence has now been discussed, and an attempt has been made to illustrate the distinction between primary and secondary modes of proof. It remains, before concluding this chapter, to be seen upon what occasions *secondary evidence* will be received.

§ 428A. The first general rule is, that *secondary evidence is inadmissible, until it is shown that the production of primary evidence is out of the party's power.* The second is, that *secondary evidence as to previous oral testimony can only be given in a prescribed way and subject to certain restrictions.* The remaining general rule as to secondary evidence is, that *there are no degrees of secondary evidence.*

§ 428B. The first of these general rules, namely, the rule that *secondary evidence is inadmissible until it be shown that the production of primary evidence is out of the party's power,* and the exceptions to it, will be most conveniently discussed with regard to, first, documentary evidence, and next, to oral testimony.

§ 428C. With respect to documents, proof of their contents may be established by secondary evidence, first, when the original writing is destroyed or lost; secondly, when its production is physically impossible, or at least highly inconvenient; thirdly, when the document is in the possession of the adverse

[1] Doe *v.* Pulman, 1842. 11 L. J. Q. B. 319; D. of Bedford *v.* Lopes, 1838, cited 3 Q. B. 623, decided by Ld. Denman; Bristow *v.* Cormican, 1878, 3 App. Cas. 641, 667, in H. L.; Gov. of Magdalen Hospital *v.* Knott, 1877, 8 Ch. D. 709 (C. A.); Clarkson *v.* Woodhouse, 1782, 3 Doug. 189. In this last case the distinction between counterparts and leases does not appear to have been much discussed, if taken at all.

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party, who refuses after notice, or in some cases without notice, to produce it; fourthly, when it is in the hands of a third party, who is not compellable by law to produce it, and who, being called as a witness with a subpœna duces tecum, relies upon his right to withhold it; fifthly, when the law raises a strong presumption in favour of the existence of the document; sixthly, when the papers are voluminous, and it is only necessary to prove their general results; and lastly, when the question arises upon the examination of a witness on the voire dire.

§ 429.[1] First, if an *instrument be destroyed or lost*, a party who seeks to give secondary evidence of its contents must, to begin with, give some evidence that the original once existed,[2] and then either prove positively, or at least presumptively (as by showing that it has been thrown aside as useless[3]), that such instrument has been destroyed, or he must show that it has been lost by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found. What *degree of diligence* is necessary in a *search* for a lost instrument cannot easily be defined, as each case must depend much on its own peculiar circumstances.[4] The party seeking to be allowed to give secondary evidence, on the ground that an instrument is lost, is, however, generally expected to show that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.[5] The object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and this is a preliminary inquiry addressed to the discretion of the judge.[6] The party offering secondary evidence, therefore, need not on ordinary occasions have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back.[7] If the document be important, and

[1] Gr. Ev. § 558, in part.
Doe *v.* Wittcomb, 1851, 6 Ex. R. 601, 605 (Ld. Campbell); in H. L., 1853, 4 H. L. C. 41 (Alderson, B.).

[3] R. *v.* Johnson, 1805, 7 East. 66.

[4] Brewster *v.* Sewell, 1820, 3 B. & Ald. 296; Gully *v.* Bp. of Exeter, 1827, 4 Bing. 298. See Pardoe *v.* Price, 1844, 14 L. J. Ex. 212; R. *v.* Gordon, 1855, 25 L. J. M. C. 19.

[5] R. *v.* Saffron Hill, 1852, 22 L. J. M. C. 22. See Moriarty *v.* Grey, 1860, 12 Ir. C. L. R. 129.

[6] Ante, § 23.

[7] M'Gahey *v.* Alston, 1836, 6 L. J. Ex. 29; recognised in Hart *v.* Hart, 1841, 11 L. J. Ch. 9.

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such as the owner may have an interest in keeping, or if any reason exist for suspecting that it has been fraudulently withheld, a very strict examination will be required; but only a comparatively slight degree of diligence will be demanded on a search for a paper supposed to be of little or no value.[1]

§ 430. When a document belongs to the personal custody of a particular individual, or is proved, or may be presumed, to be in his possession, he must in general be served with a subpœna duces tecum, and be sworn to account for it;[2] since, so long as he is capable of being called as a witness, his declarations respecting it will in strictness be inadmissible,[3] and even after his death this species of evidence, though admissible as tending to prove the diligence and extent of the search, must be received with great caution.[4] However, this species of evidence being only required for the purpose of satisfying the conscience of the

[1] Gathercole *v.* Miall, 1846, 15 L. J. Ex. 179; Brewster *v.* Sewell, 1820, 3 B. & Ald. 296; Kensington *v.* Inglis, 1807, 8 East, 278; R. *v.* East Fairley, 1825, 6 Dowl. & R. 153; Freeman *v.* Arkell, 1824, 2 B. & C. 494.

[2] See R. *v.* Saffron Hill, 1852, 22 L. J. M. C. 22.

[3] R. *v.* Denio, 1827, 7 B. & C. 620; R. *v.* Castleton, 1795, 6 T. R. 236; Williams *v.* Younghusband, 1815, 1 Stark. R. 139; Walker *v.* Lady Beauchamp, 1834, 6 C. & P. 552.

[4] R. *v.* Rawden, 1834, 2 A. & E. 158. On one occasion, where an apprentice, shortly before his death, had stated that his indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, secondary evidence of its contents was received without any search having been made for it, as proof was given that the deed had not been executed in duplicate, that the master was dead, and that his executrix had declared that she knew nothing about the instrument (R. *v.* Morton, 1815, 4 M. & Selw. 48). This decision appears to have proceeded on the somewhat dubious ground, that if the statement of the apprentice was inadmissible, the indenture was not traced into his hands, and as the term of service had expired, no particular reason could be assigned why it should be in his custody, while, if the statement was receivable to show a possession of the deed by him, it further showed that search for it was unnecessary (per Ld. Ellenborough in 4 M. & Sel. 50, 1815; explained by Bayley, J., in R. *v.* Denio, 1827, 7 B. & C. 620. See Richards *v.* Lewis, 1852, 20 L. J. C. P. 177). The second branch of this dilemma is unanswerable, but the first is open to much doubt; for even if the fact of the deed not being traced into the hands of the apprentice could preclude the necessity of searching in that quarter (as to which see post, § 434), it could not discharge the parties of laches, in having neither called the personal representative of the master, nor even examined his papers. Perhaps, however, the case may best be supported on the grounds stated in the text a few words further on. In City of Bristol *v.* Wait, 1834, 1 A. & E. 264, too, Alderson, B., held that, in order to let in secondary evidence of the appointment of one of the defendants as overseer, it was sufficient to show that one of the witnesses had asked him for his appointment, and that he had said he had lost it, whereupon no search was made. See, also, R. *v.* Fordingbridge, 1858, 27 L. J. M. C. 290.

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§§ 430, 431.

judge on a preliminary inquiry, a looser rule is allowed to prevail than would have been applicable to proof of material issues; indeed, it even has been held[1] that, in order to show that search has been made for a document, so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received.[2]

§ 431. If an instrument ought to have been deposited in a public office, or other particular place, it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have had access to it. For example, where a parish indenture of apprenticeship was proved to have been given to a person since dead to take to the overseers, and a fruitless search had been made for it in the parish chest, which was the proper repository for such instruments, secondary evidence was admitted without more;[3] where it was the duty of a paying clerk of a parish to deposit a certain cancelled cheque in a room of the workhouse, an application to the successor of this clerk for an inspection of the cheques in the room, and an ineffectual examination of several bundles, which were handed to the party searching by the successor, was deemed a sufficient search to let in secondary evidence, though no notice to produce had been served on the first clerk, he being the defendant in the cause, and though the person who succeeded him in the office was not called;[4] and on proof by the high constable, who levied under it, that he had deposited it in his office, and had sought for it there in vain, secondary evidence of the contents of a warrant issued by the defendant has been received, and this though the constable added that the town clerk had access to the office, and it was objected that the defendant should have been served with a notice to produce the warrant, and the town clerk with a subpœna duces tecum.[5]

[1] R. *v.* Kenilworth, 1845, 14 L. J. M. C. 160.

[2] R. *v.* Braintree, 1859, 28 L. J. M. C. 1; R. *v.* Kenilworth, 1845, 14 L. J. M. C. 160; Smith *v.* Smith, 1876, Ir. R. 10 Eq. 273.

[3] R. *v.* Stourbridge, 1828, 8 B. & C. 96. See Minshall *v.* Lloyd, 1837, 6 L. J. Ex. 115.

[4] M'Gahey *v.* Alston, 1836, 6 L. J. Ex. 29.

[5] Fernley *v.* Worthington, 1840, 1 M. & Gr. 491. Where, however, it appeared that a solicitor, who had prepared an agreement between the plaintiff and defendant, had sent it after execution to the defendant by his clerk, and this clerk was not

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§ 432. It is often difficult to ascertain what is the *proper custody* of an instrument,[1] and it will then always be expedient, and sometimes necessary, to search several places. For example, where a marriage settlement, after providing a portion for younger children, and vesting a legal term in trustees to secure it, reserved an ultimate remainder to the settlor's heir, a search among the papers of the surviving younger child was held insufficient to let in secondary evidence of its contents, as the papers of the surviving trustees, and of the heir, should also have been examined;[2] an expired indenture of apprenticeship remains sometimes with the master, sometimes with the apprentice, but, since the apprentice has the greatest interest in its preservation,[3] stricter inquiry should be made of him than of the master, and in the absence of positive proof respecting the possession, caution would suggest what strict law might not require[4]—a search among the papers of both. Search for an expired lease should be made among the papers of both lessor and lessee,[5] whether a term has come to an end by efflux of time or by forfeiture, since the lessee will have a right to keep the deed for a time at least, to use in an action of covenant against the lessor, but it will frequently, after a considerable interval, be found in the landlord's possession, as constituting one of the muniments of his title.[6]

§ 432.

called (having quitted the service of the solicitor a long time back), but the defendant's clerk stated that he had searched for the deed in his counting-house, where the transactions to which it referred were all carried on, and where books containing entries relating to these transactions were kept, the case, on this state of facts, and without the expression of any opinion as to the effect of the absence of the solicitor's clerk, was referred back to a master, in order that a further search might be made at defendant's private residence, since it did not appear that his clerk, who had been actively concerned in the transactions in question, had ever seen the deed at the counting-house: Hart *v.* Hart, 1841, 11 L. J. Ch. 9. And in Bligh *v.* Wellesley, 1826, 2 C. & P. 400, a witness stated that he had in vain searched for some papers in a box, in which he thought he had put them, but that he still fancied they were somewhere in his possession, though he had not looked elsewhere for them; this was insufficient (Best, C.J.)

[1] As to this, see post, §§ 659—664.

[2] Cruise *v.* Clancy, 1844, 6 Ir. Eq. R. 522; Richards *v.* Lewis, 1852, 20 L. J. C. P. 177.

[3] See Hall *v.* Ball, 1841, 10 L. J. C. P. 285.

[4] R. *v.* Hinckley, 1863, 32 L. J. M. C. 158.

[5] Brewster *v.* Sewell, 1820, 3 B. & Ald. 296; Hall *v.* Ball, 1841, 10 L. J. C. P. 285.

[6] Hall *v.* Ball, 1841, 10 L. J. C. P. 285; Plaxton *v.* Dare, 1829, 10 B. & C. 17; Elworthy *v.* Sandford, 1864, 34 L. J. Ex. 42; R. *v.* North Redburn, 1784, Cald. 452; Doe *v.* Keeling, 1848, 17 L. J. Q. B. 199. It has, however,

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§§ 433—435.

§ 433. A deed of compromise which comes from the office of the solicitor to one of the parties to it comes from the proper custody.[1] The legal custody of a document appointing an overseer is in that officer, he being the person most interested in it, and requiring its production as a sanction for those acts which he may be called upon to do under its authority; therefore, in the absence of proof that the other parish officers have the actual custody of such an instrument, it will not suffice to give them notice to produce it, but before secondary evidence can be received it will be necessary to call the overseer himself.[2]

§ 434. If the party entitled to the custody of a document be *dead*, inquiries should generally be made of his personal representatives, and if the document relate to real estate, of the heir-at-law also. But these steps will not be necessary should it appear that another party is in possession of the papers of the deceased. Therefore, where the master of an apprentice, being possessed of the indenture, failed, and an attorney took the custody of his papers, a search among these papers by the attorney, after the master's death, was held sufficient to let in secondary evidence of the deed of apprenticeship, though no inquiries had been made of the master's widow.[3]

§ 435. The law does not, moreover, require that the search should have been *recent*, or made for the *purposes of the cause*. Therefore, a search made amongst the proper papers three years before the trial was held sufficient, though it would have been more satisfactory had the papers been again examined.[4] If an instrument were executed in duplicate, or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of the contents;[5] and, in every case, before such evidence will be admissible, the original instrument must be shown to have been duly executed, and to have been otherwise

never been expressly decided that a search among the muniments of the lessor alone would not let in secondary evidence; and Bayley, J., on one occasion, seems to have thought that an examination of the lessee's papers would not be absolutely necessary. See cases just cited.

[1] Miller *v.* Wheatley, 1890, 28 L. R. Ir. 144.

R. *v.* Stoke Golding, 1817, 1 B. & Ald. 173.

[3] R. *v.* Piddlehinton, 1832, 3 B. & Ad. 460.

[4] Fitz *v.* Rabbits, 1837, 2 M. & Rob. 60.

[5] R. *v.* Castleton, 1795, 6 T. R. 236; Alivon *v.* Furnival, 1834, 3 L. J. Ex. 241. See ante, § 391.

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genuine.[1] If the instrument were of such a nature as to have required attestation,[2] the attesting witness must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced; though, if it cannot be discovered who the attesting witness was, this strictness of proof will, from necessity, be waived. In the absence of evidence to the contrary, the court will presume that a lost instrument was duly stamped.[3]

§ 436. In the Court of Probate where a will itself has, after the death of the testator, been irretrievably lost or destroyed, if its *substance* can be distinctly ascertained (either by the original instructions, by a copy of the will, or even by the recollection of witnesses who have heard it read) probate may be granted of a copy embodying such substance.[4] Before, however, evidence of its contents can be given it must be properly proved that a will, executed in accordance with the requirements of the law, has in fact existed, and evidence of declarations of the testator is inadmissible to establish this.[5] On one remarkable occasion the contents, or rather a large portion of the contents, of a lost will, were allowed to be proved by the testimony of a single interested witness, whose veracity and competency were unimpeached; and probate granted to the extent of the proof.[6] In all cases, however, of this nature, the jurisdiction of the court must be exercised with the greatest possible caution; and a judge will scarcely feel justified in acting on the evidence, unless it be of the most cogent and irrefragable character, not only free from suspicion in its sources, but exact and certain in its conclusions.[7]

§ 437. Notwithstanding the rule, which in general enables

[1] Goodier *v.* Lake, 1737, 1 Atk. 446; R. *v.* Culpepper, 1696, Skin. 673; Doe *v.* Whitefoot, 1838, 8 C. & P. 270; Jackson *v.* Frier, 1819, 16 Johns. 196 (Am.); Kimball *v.* Morrell, 1826, 4 Greenl. 368 (Am.).

[2] See, however, as to documents *not* requiring attestation, 28 & 29 V. c. 18, § 7.

[3] Ante, § 148.

[4] Wharram *v.* Wharram, 1863, 33 L. J. P. & M. 75; Podmore *v.* Whatton, 1864, 33 L. J. P. & M. 143; Moore *v.* Whitehouse, 1864, 34 L. J. P. & M. 31; In re Body, 1864, 34 L. J. P. & M. 55; In re Barber, 1866, L. R. 1 P. & D. 267; Wood *v.* Wood, 1866, L. R. 1 P. & D. 309; Finch *v.* Finch, 1867, L. R. 1 P. & D. 371; Burls *v.* Burls, 1868, L. R. 1 P. & D. 472; In re Callan, 1874, Ir. R. 9 Eq. 484; Mahood *v.* Mahood, 1874, Ir. R. 8 Eq. 359. See post, § 550.

[5] Atkinson *v.* Morris, [1897] P. 40; Eyre *v.* Eyre, [1903] P. 131.

[6] Sugden *v.* Ld. St. Leonards, 1876, 1 P. D. 154.

[7] Cases in n. [4], supra.

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§ 437. parties to prove, by secondary evidence, the contents of documents which have been lost or destroyed, in certain cases prior to the year 1854, no action could be maintained either upon certain written instruments themselves or even upon the consideration on which they were founded, without the production of such written instruments themselves. Thus, no action could at law be sustained on a *lost bill of exchange*, promissory note, or cheque, or on their respective considerations, provided the instrument had been originally drawn payable to order or bearer, and provided the fact of the loss had been specially pleaded.[1] The payee of a lost instrument of the description indicated was, to recover payment, formerly compelled to resort to a court of equity.[2] But the law on this subject was altered in 1854 by the Common Law Procedure Act of that year (which appears to be still in force); and the Bills of Exchange Act, 1882, repeats very similar provisions.[3]

[1] Ramuz *v.* Crowe, 1847, 16 L. J. Ex. 280; Crowe *v.* Clay, 1854, 23 L. J. Ex. 150; Hansard *v.* Robinson, 1827, 7 B. & C. 90; Pierson *v.* Hutchinson, 1809, 2 Camp. 211; Mayor *v.* Johnson, 1813, 3 Camp. 324; Davis *v.* Dodd, 1812, 4 Taunt. 602; Champion *v.* Terry, 1822, 3 B. & B. 295; Bevan *v.* Hill, 1810, 2 Camp. 381; Woodford *v.* Whiteley, 1830, M. & M. 517. See Alexander *v.* Strong, 1842, 11 L. J. Ex. 316; Lubbock *v.* Tribe, 1838, 7 L. J. Ex. 158; Blackie *v.* Pidding, 1848, 6 C. B. 196; and Charnley *v.* Grundy, 1854, 23 L. J. C. P. 121.

[2] Warmsley *v.* Child, 1749, 1 Ves. Sen. 141; Toulmin *v.* Price, 1800, 5 Ves. 238; Ex parte Greenway, 1802, 6 Ves. 812; Macartney *v.* Graham, 1828, 2 Sim. 285; Davies *v.* Dodd, 1817, 4 Taunt. 602; Mossop *v.* Eadon, 1810, 16 Ves. 430.

[3] § 87 of "The Common Law Procedure Act, 1854" (17 & 18 V. c. 125), is as follows:—"In case of any action founded upon a bill of exchange or other negotiable instrument," which words will include a bank note (M'Donnell *v.* Murray, 1859, 9 Ir. C. L. R. 495), or a lost half of a bank note (see Byles on Bills, 1891 edit., p. 394)—"it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge or a master, against the claims of any other person upon such negotiable instrument" (see Aranguerin *v.* Scholfield, 1856, 1 H. & N. 494; King *v.* Zimmermann, 1871, L. R. 6 C. P. 466). If the payee of a lost note can show that the instrument was never negotiable, as having been originally made payable to himself alone, he cannot, as it would seem, be called upon to give an indemnity under this clause, but the action will be sustainable, either on the instrument itself, or on the consideration, because, in such case, the defendant cannot be rendered liable to pay the amount a second time (Wain *v.* Bailey, 1839, 10 A. & E. 616; recognised in Ramuz *v.* Crowe, 1847, 16 L. J. Ex. 280; Clay *v.* Crowe, 1853, 8 Ex. 298. As to what is the effect of the bill being *destroyed*, see § 322 of the 1st edit. of this work, and Wright *v.* Ld. Maidstone, 1855, 24 L. J. Ch. 623. See, too, Conflans Quarry Co. *v.* Parker, 1867, L. R. 3 C. P. 1, where, circular notes having been lost, the party losing them was held not entitled to sue the bankers for money had and received). §§ 69 and 70 of "The

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§ 438. The second case[1] in which the contents of a written document may be proved by *secondary* evidence, is when its production is either *physically impossible, or highly inconvenient.* Thus,[2] *inscriptions on walls* and fixed tables, *mural monuments, gravestones, surveyors' marks* on boundary trees, notices affixed on boards to warn trespassers, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court.[3] For instance, on one occasion a man was convicted of writing a libel on the wall of the Liverpool gaol, on mere proof of his handwriting.[4] In order, however, to let in this description of secondary evidence, it must clearly appear that the document or writing is affixed to the freehold, and cannot easily be removed; and therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial.[5] If, too, a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original.[6]

§ 438.

Bills of Exchange Act, 1882" (45 & 46 V. c. 61), are as follow:—

§ 69. "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenour, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

"If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so."

§ 70. "In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question."

[1] See supra, § 428B.

[2] Gr. Ev. § 94, in part.

[3] Mortimer *v.* M'Callan, 1840, 6 M. & W. 68; R. *v.* Fursey, 1833, 6 C. & P. 81; Doe *v.* Cole, 1834, 6 C. & P. 360; Bartholomew *v.* Stephens, 1839, 8 C. & P. 728; Bruce *v.* Nicolopulo, 1855, 24 L. J. Ex. 321.

[4] Mentioned by Ld. Abinger in Mortimer *v.* M'Callan, 1840, 6 M. & W. 68.

[5] Jones *v.* Tarleton, 1842, 9 M. & W. 675. On one occasion, indeed, the Committee for Privileges in the House of Lords received in evidence, as proof in a pedigree, a copy of a plate of the arms of the Knights of the Garter, which had been put up in the Chapel Royal at Windsor in the reign of Henry V., and which, being fastened to the building only by screws, was physically removable; but this case seems to rest, at least partly, on the ground that the plate in question could not have been removed without a special warrant from the Queen. Semble, this evidence would not have been admissible had not the question at issue related to a *pedigree:* Berkeley Peerage, 1858-61, 8 H. L. C. 21; Shrewsbury Peerage case, 1857, 7 H. L. C. 1.

[6] Burnaby *v.* Baillie, 1889, 42 Ch.

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§§ 439, 440.

§ 439.[1] On a similar ground, the existence and contents of any record of a judicial court, and of entries in any other *public books or registers*, may be proved by an examined copy, and in some cases by an office copy, by a certified copy, or even by a mere certificate.[2] This rule extends to all records and entries of a public nature in books required by law to be kept; and is adopted, —partly, because of the serious risk of loss which the removal of such documents would occasion,—partly, because of the inconvenience which the public might experience from the removal, especially if the documents were wanted in two or more places about the same time,—and partly, because of the public character of the facts recorded, and the consequent facility of detection of any fraud or error in the copy.[3] By the Bankers' Books Evidence Act, 1879,[4] entries in bankers' books may be proved by examined copies, and a banker or officer of a bank is not compellable, in any legal proceeding to which the bank is not a party, to produce any original book or appear as a witness to prove the matters therein recorded unless by order of a judge made for special cause.

§ 439A. For very similar reasons, too, and on grounds of convenience, in an action for infringement of a copyright in a picture it is not necessary to produce the original picture, but the infringement may be proved by persons who, on looking at the infringement in court, say that it resembles it.[5]

§ 440. The third case in which secondary evidence of a written document is admissible is when a document is in the *possession of the adversary, who withholds it at the trial, and a notice to produce the original has been duly served, where such notice is requisite.*[6] This rule applies equally both in civil and criminal cases. In either mode of proceeding, in order to render the

D. 282; Alivon *v.* Furnival, 1834, 3 L. J. Ex. 241; Boyle *v.* Wiseman, 1855, 24 L. J. Ex. 284; Quilter *v.* Jorss, 1853. See 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 7; and Crispin *v.* Doglioni, 1862, 32 L. J. P. & M. 109.

[1] Gr. Ev. § 91, in part.

[2] This subject will be dicussed post, §§ 1534 et seq.

[3] B. N. P. 226.

[4] 42 & 43 V. c. 11. And see post, § 1608A.

[5] Williams *v.* Lucas, [1892] 2 Q. B. 113 (C. A.).

[6] R. *v.* Watson, 1788, 2 Stark. R. 139; Att.-Gen. *v.* Le Marchant, 1772, 2 T. R. 201, n.; Cates *v.* Winter, 1789, 3 T. R. 306. As to the presumption respecting the stamp, see ante, § 148.

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notice available, it must, however, be first shown that the instrument is in the hands, or under the control, of the party required to produce it.[1] Very slight evidence will raise a sufficient presumption of this where the document exclusively belongs to or in the regular course of business ought to be in the custody of a party served. Therefore, where a bankruptcy certificate was proved to have been obtained for a defendant, the court presumed that it had come into his possession;[2] while, if papers were last seen in the hands of a defendant, it lies upon him to trace them out of his possession,[3]—and for this purpose he may interpose with evidence while the plaintiff's case is proceeding, and, such evidence being submitted to the judge alone,[4] its submission does not give the plaintiff's counsel a right to reply to the jury.[5] Where a party has notice to produce a particular instrument which has been traced to his possession, he cannot, it seems, object to parol evidence of its contents being given, on the ground that, *previously to* the notice, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it.[6] Neither can he escape the effect of the notice, by *afterwards* voluntarily parting with the instrument, which it directs him to produce.[7]

§ 441. If an instrument be in the possession of a person in *privity* with the partner, such as his banker,[8] agent, servant, deputy, or the like, such person need not be served with a subpœna duces tecum, or even be called as a witness, but a notice given to the party himself will suffice.[9] For example, the admission of secondary evidence will be justified by a notice to a shipowner to produce papers, though the captain has possession

[1] Sharpe *v.* Lamb, 1840, 11 A. & E. 805.

[2] Henry *v.* Leigh, 1813, 3 Camp. 499. See, also, Robb *v.* Starkey, 1845, 2 C. & K. 143.

[3] R. *v.* Thistlewood, 1820, 33 How. St. Tr. 691; R. *v.* Ings, 1820, 33 How. St. Tr. 757.

[4] Supra, §§ 23 et seq.

[5] Harvey *v.* Mitchell, 1841, 2 M. & Rob. 366; Smith *v.* Sleap, 1843, 1 C. & K. 48.

[6] Sinclair *v.* Stevenson, 1824, 1 C. & P. 585. In Knight *v.* Martin, 1819, Gow, 103, where secondary evidence was held inadmissible, the party, who was served with notice to produce a lease, told his opponent that he had assigned it.

[7] Per Dallas, C.J., in Knight *v.* Martin, 1819, Gow. 104.

[8] Partridge *v.* Coates, 1824, Ry. & M. 156; Burton *v.* Payne, 1827, 2 C. & P. 520.

[9] Sinclair *v.* Stevenson, 1824, 1 C. & P. 584.

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§§ 441, 442.

of them for his own protection,[1]—or by a notice to a sheriff to produce a warrant, which is shown to have been returned to the under-sheriff during the time that the sheriff remained in office;[2] and a document deposited in a court of equity by a party to a suit, and scheduled in his answer, which had been ordered to be delivered to him, was held to be sufficiently within his control to let in secondary evidence after notice to produce, though it appeared that, at the time of the trial, the document was still in the hands of an officer of the court.[3] But the party served with the notice to produce must have such a right to the instrument which is the subject of it as would entitle him not merely to inspect it, but to retain it. Therefore, where a document is held by a stakeholder between the defendant and a stranger to the cause,[4] or where it has been delivered to a third person, under whom the defendant has justified in an action of trespass, and by whose directions he acted,[5] parol evidence of its contents must be rejected, notwithstanding that a notice to produce has been duly served on the defendant.

§ 442. Before, however, secondary evidence of the contents of such documents becomes admissible, it is necessary that a proper notice to produce should be served upon the party under whose control they are. The notice must not only be in *writing*,[6] but, so far as civil proceedings are concerned, must be in the special form directed by the Rules of Court.[7] Under the present practice the notice is *sufficiently* served if left within the prescribed hours[8] at the address for service of the person to be served, as defined by Orders IV. and XII., with any person resident at or belonging to such place.[9] Under the old practice

[1] Baldney *v.* Ritchie, 1824, 1 Stark. R. 338.

[2] Taplin *v.* Atty, 1825, 3 Bing. 164; Suter *v.* Burrell, 1857, 27 L. J. Ex. 193.

[3] Rush *v.* Peacock, 1838, 2 M. & Rob. 162.

[4] Parry *v.* May, 1833, 1 M. & Rob. 279.

[5] Evans *v.* Sweet, 1824, Ry. & M. 83.

[6] See R. S. C. 1883, Ord. LXVI., r. 1.

[7] Ord. XXXII. r. 8, Form No. 14, App. B. As to County Courts, see C. C. R. 1903, Ord. XVIII. rr. 7—9.

[8] I.e., before the hours of two in the afternoon on Saturdays and six in the afternoon on other week-days, Ord. LXIV. r. 11.

[9] Ord. LXVII. r. 2. Ord. IV. rr. 1—3, provide for plaintiff's address for service to appear on writ. Ord. XII. rr. 10—11, provide for defendant's address for service to appear on notice of appearance.

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§§ 442, 443.

the notice might have been directed to the party or to his solicitor, and might have been served on either,[1] and the present rule does not appear to forbid this, although it is clearly intended and is obviously the most convenient practice for service of notices to be made whenever practicable at the address for service. Moreover, where notice is given by a solicitor that a person who has originally sued or appeared in person has authorised such solicitor to act in the cause or matter on his behalf, it is provided that notices *shall* thereafter be delivered to or served upon such solicitor. Where the solicitor has been changed, service on the first solicitor will be good until notice of the change is filed and served on the other side.[2]

§ 443. It is difficult to lay down any general rule as to *what a notice to produce ought to contain*, since much must depend on the particular circumstances of each case. No misstatement or inaccuracy in the notice will, however, be deemed material, if not really calculated to mislead the opponent.[3] Neither is it necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended. Indeed, to do so may be dangerous, since if any material errors were inadvertently made, the party sought to be affected by the notice might urge, with possible success, that he had been misled thereby. If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient.[4] But a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered,"[5] has been held too vague to admit secondary proof of a notice of dishonour sent by the plaintiff to the defendant. And in an action[6] against four defendants, as owners of a sloop, to recover an account for

[1] Hughes *v.* Budd, 1840, 8 Dowl. 315; R. *v.* Barker, 1858, 1 F. & F. 326; R. *v.* Boucher, 1859, 1 F. & F. 486; Houseman *v.* Roberts, 1832, 5 C. & P. 394; Cates *v.* Winter, 1789, 3 T. R. 306. This last case was a qui tam action. See R. *v.* Downham, 1858, 1 F. & F. 386.

[2] As to change of solicitors, see Ord. VII. r. 3.

[3] Justice *v.* Elstob, 1858, 1 F. & F. 256; Graham *v.* Oldis, 1858, 1 F. & F. 262.

[4] See Rogers *v.* Custance, 1839, 2 M. & Rob. 181.

[5] France *v.* Lucy, 1825, Ry. & M. 341.

[6] Jones *v.* Edwards, 1825, M'Cl. & Y. 139.

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§§ 443—445. warehousing the rigging of the vessel, in order to prove that one defendant was a joint owner, the plaintiff called for a letter, which was stated to have been written nine years before by this defendant to the son of another defendant, and relied upon a "notice to produce letters and copies of letters, and all books relating to the cause," but the court decided that the notice was too uncertain, and no sensible man could entertain a different opinion. It is believed that many judges still act upon these old principles, though later decisions justify a greater laxity of practice.[1]

§ 444. In an old case, a notice which misdescribed the title of the cause was held invalid;[2] but an objection to a notice on the ground that it was entitled (by mistake) in a wrong court, was overruled, Alderson, B., saying, "One does not know where we are to stop. Would the notice be bad if one of the names was spelt wrong? . . . At the time of the decision in Harvey v. Morgan, the courts were much more strict than now as to matters of this nature,"[3] and at the present day no technical objection of this kind would be upheld unless it appeared that the opposite party had been misled by the irregularity.

§ 445. As to the *time* and *place* of the *service*, no more precise rule can be laid down, than that it must be such as to enable the party, under the known circumstances of the case, to comply

[1] Thus, a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (Jacob *v.* Lee, 1837, 2 M. & Rob. 33; see, also, Connybear *v.* Farries, 1869, L. R. 5 Eq. 16), or "all letters written to or received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf, and also all books, papers, &c., relating to the subject-matter of this cause" (Morris *v.* Hauser, 1841, 2 M. & Rob. 392), have respectively been held sufficient to let in parol evidence of a particular letter not otherwise specified. In these cases the names of the parties by and to whom the letters were addressed appeared on the notice. This was pointed out and relied upon by Patteson, J., in Jacob v. Lee, 1837, 2 M. & Rob. 33. The Court of Queen's Bench, in an action for work and labour, also decided that a notice to produce "all documents relating to the matters in question in this cause," comprehended with sufficient precision a particular account relating to a small part of the work, though it appeared that many such accounts for different parts of the work had been rendered by the plaintiff to the defendant: Rogers v. Custance, 1837, 2 M. & Rob. 181.

[2] Harvey *v.* Morgan, 1816, 2 Stark. R. 17. The notice in that case was entitled "A. and B., assignees of C. and D., *v.* E.," instead of "A. and B., assignees of C., *v.* E."

[3] Lawrence *v.* Clark, 1845, 15 L. J. Ex. 40.

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§§ 445, 446.

with the call.[1] If the person to be served, whether client or solicitor, dwell in another town than that in which the trial is had, he must generally be served before the commission day.[2] Service after he has left home to attend the court will usually be insufficient.[3] In town causes, however, and in country causes, where the solicitor lives in the assize town, a shorter notice will suffice, and if the documents be such as may reasonably be presumed to be in the solicitor's possession, service on him, or at his office, before six o'clock[4] in the afternoon of the day preceding the trial, will generally be sufficient;[5] though, if the documents would probably be in the client's custody,—as, for instance, if they were a tradesman's books,[6] or if they were letters or papers not obviously connected with the cause,—such service would be too late.[7] And a notice during the trial of a town cause lasting twelve days, given on one day during the trial for the next, is not sufficient.[8] If a party be served with notice sufficiently early to enable him to produce the document, it makes no difference that at the time of the service the cause is part heard.[9]

§ 446. If the party served with a notice to produce can prove that his papers are in a *foreign* country, or at such a distance from the place of trial as to render it impossible for him to produce them under an ordinary notice, such a notice will

[1] R. *v.* Hankins, 1849, 2 C. & K. 823; R. *v.* Kitson, 1853, 22 L. J. M. C. 118.

[2] Trist *v.* Johnson, 1833, 1 M. & Rob. 250; R. *v.* Ellicombe, 1833, 5 C. & P. 522; Lessee of Leader *v.* Duggan, 1841, Ir. Cir. R. 124; Humphrey *v.* St. Ledger, 1841, Ir. Cir. R. 714; M'Master and Boyle's case, 1843, Ir. Cir. R. 786. See Howard *v.* Williams, 1842, 9 M. & W. 725.

[3] George *v.* Thompson, 1836, 4 Dowl. 656; Hargest *v.* Fothergill, 1832, 5 C. & P. 303.

[4] See post, § 1586A, citing Ord. LXIV. r. 11, of R. S. C. 1883.

[5] Atkins *v.* Meredith, 1836, 4 Dowl. 658; Leaf *v.* Butt, 1842, C. & Marsh. 451; Meyrick *v.* Woods, 1842, C. & Marsh. 452; Firkin *v.* Edwards, 1840, 9 C. & P. 478; Gibbons *v.* Powell, 1840, 9 C. & P. 634; R. *v.* Hamp, 1852, 6 Cox, C. C. 167; Holt *v.* Miers, 1839, 9 C. & P. 195; Lawrence *v.* Clark, 1845, 15 L. J. Ex. 40. If the trial is to take place on the Monday, a service on the Sunday, or even on Saturday after 2 p.m. (see rule cited in last note), will not do; and perhaps a service on a Sunday would in any event be bad. See Hughes *v.* Budd, 1840, 8 Dowl. 315; and 29 Car. 2, c. 7, § 6 ("The Sunday Observance Act, 1677").

[6] Atkins *v.* Meredith, 1836, 4 Dowl. 658.

[7] Byrne *v.* Harvey, 1838, 2 M. & Rob. 89; Vice *v.* Lady Anson, 1827, M. & M. 97; Aflalo *v.* Fourdrinier, 1829, M. & M. 334, n.

[8] Sugg *v.* Bray, 1885, 54 L. J. Ch. 132.

[9] Sturm *v.* Jeffree, 1847, 2 C. & K. 442.

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§§ 446, 447.

be inoperative. The courts, however, incline to favour the sufficiency of the notice, whenever the circumstances will warrant it. For example, where a party had gone abroad, leaving the cause in the hands of his solicitor, it was presumed that he had left with him all papers material to the cause, and, consequently, a notice served on the solicitor the evening next but one before the trial, was held to be sufficient;[1] a four days' notice, given to the defendant to produce letters written by him to his partner in New South Wales, was considered good, where long litigation on the subject of them made it presumable that they had been remitted to this country;[2] and even a similar notice to a foreign defendant was sufficient where the action had commenced only seven months before the trial, though the letters required had been addressed to him eighteen years before at his residence abroad, Abbott, C.J., observing that it would lead to great inconvenience and delay if trials were allowed to be postponed upon such an objection.[3]

§ 447. However, a party who seeks the production of papers must not put his adversary to needless trouble and expense. A solicitor who, having been served in Essex with notice to produce certain deeds, fetched them from London, and on the commission day was served with a fresh notice to produce another deed, which he on being served stated was also in town, but then said that it should be forthcoming at the trial if the other side would pay the expenses of a messenger, after this offer had been declined, was held justified, in the absence of payment of such expenses, in not complying with the notice, and it also was held that secondary evidence was not rendered admissible by such second notice.[4] So, too, if a notice to produce comprises documents which are not necessary, the costs occasioned thereby have to be borne by the party giving the notice.[5] If a party, on being served with a notice to produce a document, states that it is not in existence, parol proof of its contents will be received,

[1] Bryan *v.* Wagstaff, 1825, Ry. & M. 327.

[2] Sturge *v.* Buchanan, 1839, 10 A. & E. 598.

[3] Drabble *v.* Donner, 1824, Ry. & M. 47. But see Ehrenspergen *v.* Anderson, 1848, 18 L. J. Ex. 132.

[4] Doe *v.* Spitty, 1832, 3 B. & Ad. 182. Perhaps the second notice, having being served on the commission day, would have been too late, independent of the special circumstances.

[5] Ord. XXXII. r. 9.

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and no objection can be taken to the lateness of the service.[1] A notice to produce certain documents "upon the trial of the cause," applies not merely to the trial which it immediately precedes, but to every subsequent trial of the same cause which may take place.[2]

§ 448. By R. S. C. 1883, Order XXXII. r. 8, "An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served."

§ 449. In *seven cases* notice to produce *is not necessary*, viz.: (1) where a duplicate original or a counterpart is at hand; (2) where the document required is itself a notice; (3) if the form of the proceedings tells the party that he will be charged with the possession of the instrument and called on to produce it; (4) in odium spoliatoris; (5) in the case of agreements by sailors with masters of ships; (6) where the document required is admittedly lost; and (7) where it is actually in court.

§ 449A. The first of such seven cases is, where the instrument in the possession of the adversary, and that tendered in evidence, are either *duplicate originals*,[3] or are *counterparts*, and the part offered in evidence has been executed by the adversary, or by some person through whom he claims. The instrument produced is, as before stated, considered primary evidence, not secondary.[4]

§ 450. The second of the seven cases just indicated arises where the instrument to be proved is itself a *notice*. This exception appears to have been originally adopted in regard to notices to produce, for the obvious reason, that, if a notice to produce such a document were necessary, the series of notices would become infinite.[5] The exception has subsequently been extended to other notices, and now lets in proof by copies, if not

[1] Foster *v.* Pointer, 1841, 9 C. & P. 718.

[2] Hope *v.* Beadon, 1851, 21 L. J. Q. B. 25.

[3] Colling *v.* Treweek, 1827, 6 B. & C. 398; Philipson *v.* Chase, 1809, 2 Camp. 111.

[4] Ante, § 426.

[5] 3 St. Ev. 730; Philipson *v.* Chase, 1809, 2 Camp. 111. But see ante, § 448. This has arisen, partly, perhaps, from a misapprehension of the ground on which the doctrine rests (in Philipson *v.* Chase, 1809, 2 Camp. 111, Ld. Ellenborough observes: "Wilson, J., said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum"). The foregoing reasoning is fallacious. See 3 St. Ev. 3rd edit. (1842) 730. The real reasons for the rule are, partly, the experienced

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by any species of secondary evidence, of a notice to quit;[1] of a notice of dishonour,[2] provided the action be brought upon the bill, but not otherwise;[3] of all such notices of action, or written demands, as are necessary to entitle the plaintiff to recover;[4] and of bills of costs of solicitors, and parliamentary agents, delivered pursuant to statute.[5]

§ 451. An exception to the general principle, that no notice to produce a notice is usually required, appears to exist in all cases in which the notice required to be produced has been served on a third person.[6] Accordingly, where two parties had become sureties, by a joint and several bond, for the payment, within one month after notice should have been given to them, of such sum as should be due from their principal, it has been held that the service of notice upon one of the parties cannot be proved in an action brought against the other, by producing the duplicate of the notice, but that the first party should have been subpœnaed to produce the original, or to account for its non-production.[7]

inconvenience attendant on a strict observance of the rule requiring notice (2 Ph. Ev. 226, n. 5); partly, because the secondary evidence that is usually offered of a notice is a copy of the paper sent, which partakes in great measure of the character of a duplicate original (Kine *v.* Beaumont, 1822, 3 B. & B. 291); and, chiefly, because it constantly happens that the opposite party is well aware, from the nature of the action, that he will be charged with the possession of the original document (Colling *v.* Treweek, 1827, 6 B. & C. 398; Robinson *v.* Brown, 1845, 16 L. J. C. P. 46. See post, § 452).

[1] Doe *v.* Somerton, 1845, 14 L. J. Q. B. 210; Jory *v.* Orchard, 1779, 2 Bos. & P. 39; Colling *v.* Treweek, 1827, 6 B. & C. 398. See R. *v.* Mortlock, 1845, 14 L. J. M. C. 153.

[2] Swain *v.* Lewis, 1835, 2 C. M. & R. 261; Kine *v.* Beaumont, 1822, 3 B. & B. 291; Ackland *v.* Pearce, 1811, 2 Camp. 601; Roberts *v.* Bradshaw, 1815, 1 Stark. R. 28; Colling *v.* Treweek, 1827, 6 B. & C. 398. The first two of these cases were decided after conferring with the judges of the other courts, and put the question beyond dispute, overruling Langdon *v.* Hulls, 1804, 4 Q. B. D. 337; and Shaw *v.* Markham, 1791, Pea. R. 165.

[3] Lanauze *v.* Palmer, 1827, M. & M. 31.

[4] Jory *v.* Orchard, 1799, 2 Bos. & P. 39.

[5] Colling *v.* Treweek, 1827, 6 B. & C. 398, decided on § 23 of the repealed Act (2 G. 2, c. 23), but equally applicable to § 37 of 6 & 7 V. c. 73 ("The Solicitors Act, 1843"). In an action against a surety, on a bond conditioned to pay the plaintiff the principal within six months after notice, Ld. Ellenborough, however, held a notice to produce this notice to be necessary, on the ground that it was not a mere notice, but in the nature of a statement of account between the plaintiff and the principal (Grove *v.* Ware, 1817, 2 Stark. R. 174). Whether this case would now be considered a binding authority may well be questioned, since, in principle, it is difficult to distinguish it from several of the cases cited above, in which notice to produce has been deemed unnecessary.

[6] Robinson *v.* Brown, 1846, 16 L. J. C. P. 46.

[7] Id.

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452. The third of the seven cases in which a notice to produce is unnecessary, is where from the nature of the action, or indictment, or from the form of the pleadings, the *defendant must know* that he will be charged with the possession of an instrument, and *be called upon to produce* it.[1] For instance, in an action of trover for converting a bond, a bill of exchange, or other writing,[2] or in a prosecution for stealing any document,[3] the counsel for the plaintiff or the Crown may at once produce secondary evidence of its contents, even though the defendant offer to produce the document itself.[4] A like rule prevails in an action on contract against a carrier for the non-delivery of written instruments,[5] as also in indictments for conducting a traitorous correspondence.[6] It is, however, inapplicable on a charge of forging a deed:[7] or on an indictment for arson, with intent to defraud an insurance office.[8] Similarly, it is the necessary (though reverse) consequence of this rule that a plaintiff may object to a defendant, who is the maker of a note or cheque, or the acceptor of a bill, the making or acceptance of which is not denied by the latter's pleadings, and is therefore admitted on the record,[9] giving secondary evidence of its contents, for the purpose even of identification, unless a notice to produce has been duly served,[10] or unless the instrument is shown to be in court.[11]

§ 453. The fourth case, in which a notice to produce is not

[1] Colling *v.* Treweek, 1827, 6 B. & C. 398. See ante, §§ 407, 408.

[2] Scott *v.* Jones, 1813, 4 Taunt. 865; How *v.* Hall, 1811, 14 East, 274; Bucher *v.* Jarratt, 1802, 3 Bos. & P. 143. These cases overrule Cowan *v.* Abrahams, 1793, 1 Esp. 50.

[3] R. *v.* Aickles, 1784, 1 Leach, 297, n.; R. *v.* Brennan, 1843, 3 Craw. & D. C. C. 109 (Ir.).

[4] Whitehead *v.* Scott, 1830, 1 M. & Rob. 2.

[5] Jolly *v.* Taylor, 1807, 1 Camp. 143.

[6] R. *v.* De la Motte, 1781, 1 East, P. C. 124; Layer's case, 1722, 16 How. St. Tr. 93.

[7] R. *v.* Haworth, 1830, 4 C. & P. 254. See Spragge's case (no date given; decided by Buller, J.), cited by Ld. Ellenborough, 1811, 14 East, 276; also R. *v.* Elworthy, 1867, L. R. 1 C. C. R. 103.

[8] R. *v.* Ellicombe, 1834, 5 C. & P. 522; R. *v.* Kitson, 1852, 22 L. J. M. C. 118. See R. *v.* Humphries, 1829, cited 3 Russ. C. & M. 344; R. *v.* Mortlock, 1845, 14 L. J. M. C. 153.

[9] The plaintiff, however, cannot recover interest on the bill from the date of its maturity without producing it: Hutton *v.* Ward, 1850, 19 L. J. Q. B. 293; Chaplin *v.* Levy, 1854, 23 L. J. Ex. 117.

[10] Goodered *v.* Armour, 1842, 12 L. J. Q. B. 56; explaining Read *v.* Gamble, 1839, 10 A. & E. 597, n.; Lawrence *v.* Clark, 1845, 15 L. J. Ex. 40. See, also, Chaplin *v.* Levy, 1854, 23 L. J. Ex. 117.

[11] Dwyer *v.* Collins, 1852, 21 L. J. Ex. 225.

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necessary, is where possession of the paper, the production of which is required, has been obtained by the adverse party, fraudulently or forcibly, as where, after action brought, he has received it from a witness, in fraud of a subpœna duces tecum.[1] In such cases "in odium spoliatoris" a notice to produce is not required to be given to him before admitting secondary evidence of the contents of the document of which he has improperly obtained possession.

§ 454. The fifth case in which notice to produce is not needed, is, that by statute every seaman may bring forward evidence to prove the contents of his agreement with the master of the ship, or otherwise to support his case, without producing, or giving notice to produce, the agreement itself or any copy of it.[2] The reason for this indulgence is the proverbial inexperience and recklessness of seafaring men.

§ 455. The sixth instance in which notice to produce is dispensed with is where either the adverse party or his solicitor has admitted that a document is lost—for in such case the notice would be nugatory,[3]—or, where, as it seems, the party in possession of the writing might himself give secondary evidence of its contents without producing it, as, for instance, if it be an inscription or notice attached to the freehold.[4] Under this exception, however, a party cannot call witnesses to *prove* the destruction of a document that has been traced into the hands of his opponent, and then show its contents by secondary proof, unless he has first served a notice to produce, since (notwithstanding the evidence to the contrary) the document may still be in existence, or, at any rate, the opponent may dispute the fact of its having been destroyed.[5]

§ 456. In the seventh, and last, place, notice to produce is unnecessary if it be proved that the adverse party, or his solicitor, has the original instrument in court. For the object

[1] Leeds *v.* Cook, 1803, 4 Esp. 256; Doe *v.* Ries, 1831, 8 Bing. 178.

[2] 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 123. See Bowman *v.* Manzelman, 1809, 2 Camp. 315.

[3] R. *v.* Haworth, 1830, 4 C. & P. 254; Foster *v.* Pointer, 1841, 9 C. & P. 718; How *v.* Hall, 1811, 14 East, 274; Doe *v.* Spitty, 1832, 3 B. & Ad. 182.

[4] Bartholomew *v.* Stephens, 1839, 8 C. & P. 728.

[5] Doe *v.* Morris, 1835, 3 A. & E. 46.

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§§ 456, 457.

of the notice is not,—as was formerly thought,[1]—to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but merely to enable him to produce it, if he likes, at the trial, and thus to secure the best evidence of its contents.[2] If a solicitor, on being called by his client's opponent to state whether he has a particular document in court, asserts that he does not know whether he has it with him or not, and that he does not intend to ascertain that fact, unless compelled to do so by the judge, it is undecided whether or not he will then be ordered to search among his papers; probably he will.

§ 457. The fourth[3] class of cases in which secondary evidence as to documents is admissible, is when a document is in the hands of a stranger, who is either *not compellable by law* to produce it, and who justifiably *refuses* to do so either when summoned as a witness with a subpœna duces tecum,[4] or, when having been sworn as a witness with a subpœna, he admits that he has the document in court.[5] The mere *disobedience* of a person served with a subpœna duces tecum will not render admissible secondary evidence of the contents of the document which he is called upon to produce.[6] To do this the witness must be *justified* in refusing the production, for otherwise the party will have no remedy, except as against *him*.[7] The rule is only recognised at all for the same reason as that which allows of parol proof, when an adversary, after notice, refuses to produce a deed in his possession,—namely, because the party offering secondary evidence has done all in his power to obtain the original document.[8] If, therefore, a solicitor refuses to

[1] Bate *v.* Kinsey, 1834, 1 C. M. & R. 41; Cook *v.* Hearn, 1832, 1 M. & Rob. 20; Doe *v.* Grey, 1816, 1 Stark. R. 284; Exall *v.* Partridge (no date given), cited (by Scarlett, *arg.* Doe *v.* Grey, 1 Stark. 284) as having been ruled by Ld. Kenyon.

[2] Dwyer *v.* Collins, 1852, 21 L. J. Ex. 225.

[3] See § 428, supra, as to the three classes which preceded and as to the others which follow the present class.

[4] Manston *v.* Downes, 1834, 1 A. & E. 31; Doe *v.* Ross, 1840, 10 L. J. Ex. 201; Mills *v.* Oddy, 1834, 6 C. & P. 728; Doe *v.* Owen, 1837, 8 C. & P. 110, can no longer be supported.

[5] Doe *v.* Clifford, 1847, 2 C. & Kir. 448; Newton *v.* Chaplin, 1850, 19 L. J. C. P. 374.

[6] Jesus College *v.* Gibbs, 1834, 4 L. J. Ex. Eq. 42.

[7] R. *v.* Llanfaethly, 1853, 2 E. & B. 940.

[8] Doe *v.* Ross, 1840, 10 L. J. Ex. 201.

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produce a deed as claiming a lien upon it, secondary evidence of its contents cannot be received, where the party tendering such evidence is the person liable to pay the solicitor's charges.[1] And if a solicitor, who is not acting under special instructions from his client, declines to produce an instrument on the ground of privilege, it is very questionable whether the client must not be subpœnaed, in order to ascertain whether he relies on a right to withhold the deed;[2] and it will at least be prudent to do this, inasmuch as the privilege is, in strictness, not that of the solicitor, but that of the client. If, however, the solicitor swear that his client has instructed him not to produce the instrument, it will not be necessary to subpœna the client; for in such a case it would be assumed that the client, if called, would continue of the same mind.[3]

§ 458. Judges always refuse to compel either a witness or a party to a cause[4] to produce either his title-deeds,[5] or any document the production of which may tend to criminate him,[6] or any document which he holds as mortgagee[7] or pledgee.[8] But a witness will not be allowed to resist a subpœna duces tecum on the ground of any lien[9] he may have on the document called for as evidence,[10] unless the party requiring the production be himself

[1] Att.-Gen. *v.* Ashe, 1859, 10 Ir. Ch. R. 309. See, however, as to a claim of lien, infra, § 458.

[2] Doe *v.* Ross, 1840, 10 L. J. Ex. 201; Newton *v.* Chaplin, 1850, 19 L. J. C. P. 374; In re Cameron's Coalbrook, &c. Rail. Co. 1858, 25 Beav. 1.

[3] Phelps *v.* Prew, 1854, 23 L. J. Q. B. 140.

[4] The rule, so far as it relates to parties, appears to be this; a plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information and belief, contain anything impeaching his case, or supporting or material to the case of the defendant: Minet *v.* Morgan, 1873, L. R. 8 Ch. 361.

[5] Pickering *v.* Noyes, 1823, 1 B. & C. 263; Harris *v.* Hill, 1822, 2 Stark, R. 140; R. *v.* Upper Boddington, 1826, 8 D. & R. 726; Doe *v.* Clifford, 1847, 2 C. & K. 448; Egremont Burial Board *v.* Egremont Iron Ore Co., 1880, 14 Ch. D. 158.

[6] See Whitaker *v.* Izod, 1809, 2 Taunt. 115.

[7] Doe *v.* Ross, 1840, 10 L. J. Ex. 201; explained by Turner, L.J., in Hope *v.* Liddell, 1855, 24 L. J. Ch. 694; Chichester *v.* Marq. of Donegall, 1876, L. R. 5 Ch. 497; Costa Rica, Republic of *v.* Erlanger, 1875, L. R. 19 Eq. 33.

[8] See Ex parte Shaw, 1821, Jac. 270.

[9] In the Courts of Bankruptcy, "no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of account belonging to the debtor, or to set up any lien thereon": Bankruptcy Rules, 1883, r. 259.

[10] Hunter *v.* Leathley, 1830, 10 B. & C. 858, recognised in Ley *v.* Barlow, 1848, 17 L. J. Ex. 105; Thompson *v.* Mosely, 1833, 5 C. & P. 502; Brassington *v.* Brassington, 1823, 1

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the person against whom the claim of lien is made.[1] If the witness be a solicitor, though he will be *permitted*, he will certainly not be *forced*,[2]—except in some cases for the purpose of identification,[3]—to produce any instrument which he holds confidentially for his client, and which the client has a right to keep back;[4] but, as just noticed, it by no means necessarily follows that, in the event of the client himself not being summoned, secondary evidence will be admissible.[5] A solicitor who has not acted for either of the parties to an action may be summoned as a witness on a subpœna duces tecum and compelled to produce documents on which he claims a lien.[6] He will also be ordered to produce to the trustee of a bankrupt documents over which he has a lien, but which are the property of the bankrupt.[7] Where a litigant can show that the retention by his solicitor of papers over which the latter has a lien would embarrass the litigant in his action, the solicitor may be ordered to deliver up the papers on payment into court or security given.[8] If a solicitor has a lien over documents belonging to his client, the solicitor is nevertheless bound to produce them for the benefit of a third person if his client would have been bound to do so.[9]

§ 459. The rule exempting witnesses from producing title-deeds extends to a will, under which the witness claims as

Sim. & St. 455; Pratt *v.* Pratt, 1882, 51 L. J. Ch. 838; Furlong *v.* Howard, 1804, 2 Sch. & Lef. 115 (Ir.); In re Cameron's Coalbrook, &c. Rail. Co., 1858, 25 Beav. 1; Hope *v.* Liddell, 1855, 24 L. J. Ch. 694; overruling Griffith *v.* Ricketts, 1849, 19 L. J. Ch. 399. See, also, Lockett *v.* Carry, 1864, 3 New R. 405; Ex parte Paine and Layton, 1869, L. R. 4 Ch. 215 (C. A.); Re Toleman, Ex parte Bramble, 1880, 13 Ch. D. 885.

[1] Kemp *v.* King, 1842, 2 M. & Rob. 437, recognized in Hope *v.* Liddell, 1855, 24 L. J. Ch. 694. See In re Capital Fire Ins. Assoc., 1883, 24 Ch. D. 408, and cases there cited. Also, In re Cameron's Coalbrook, &c. Rail. Co., 1858, 25 Beav. 1; Vale *v.* Oppert, 1875, L. R. 10 Ch. 340 (C. A.). But see Fowler *v.* Fowler, 1881, 50 L. J. Ch. 686, et qu.; Re Martin, 1883, 13 L. R. Ir. 312.

[2] Hibberd *v.* Knight, 1848, 17 L. J. Ex. 119, explaining Marston *v.* Downes, 1834, 1 A. & E. 31.

[3] Phelps *v.* Prew, 1854, 23 L. J. Q. B. 140.

[4] Harris *v.* Hill, 1822, 2 Stark. R. 140; Volant *v.* Soyer, 1853, 22 L. J. C. P. 83; Doe *v.* James, 1837, 2 M. & Rob. 47; Ditcher *v.* Kenrick, 1824, 1 C. & P. 161. See Doe *v.* Langdon, 1848, 18 L. J. Q. B. 17.

[5] This sentence was cited and approved in Bursill *v.* Tanner, 1885, 16 Q. B. D. 1 (C. A.).

[6] Re Hawkes, [1898] 2 Ch. pp. 16, 16, 25.

[7] Re Toleman, 1880, 13 Ch. D. p. 885.

[8] Re Foster, 1904, 116 L. T. Jo. 388; and see Ord. LIV. r. 4.

[9] Re Hawkes, ubi supra; Re Lawrence, [1894] 1 Ch. 556.

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§§ 459, 460.

devisee, though such will extend to personalty as well as to realty, and, therefore, ought to have been deposited in the Ecclesiastical Court, where the public might have had access to it.[1] But the rule will not prevail unless it appears that the title of the person possessing the document will in some way be affected by its production.[2] For instance, in an action of ejectment, where the plaintiff's title was disputed, the solicitor of a gentleman, who had been in treaty (which ultimately went off) for the purchase of the property, was allowed to produce on behalf of the defendant the abstract delivered to his client, as furnishing secondary evidence of the contents of the deeds relating to the property which had, after notice, not been produced.[3]

§ 460. However, the mere circumstance that the production of the document may render the witness liable to a *civil* action, does not entitle him to withhold it as being within the protection of the rule. For instance, in an action of ejectment, where a plaintiff claimed under a devise in remainder, and defendant held under an invalid lease by a late tenant for life, a witness, who was an executor and legatee of the late tenant for life, was compelled to produce his testator's rent-book to enable the plaintiff to identify the lands in question with the lands originally devised, notwithstanding that the witness was, as executor, bound (under a covenant contained in the lease granted by the late tenant for life) to indemnify the defendant from all loss he might sustain from an adverse verdict;[4] and where a witness, who was steward of a borough, and attorney for the lord, declined to produce certain old precepts, books of presentment, and a case, relative to his office, on which the opinion of counsel had been taken by a former steward, saying that he held them as attorney for the lord, and that their production would prejudice his client's interest, it was held that as the precepts and presentments were public documents he was bound to produce all of them, except the case and opinion.[5]

[1] Doe *v.* James, 1837, 2 M. & Rob. 47.
[2] Lee *v.* Merest, 1870, 39 L. J. Ecc. 53.
[3] Doe *v.* Langdon, 1848, 18 L. J. Q. B. 17.
[4] Doe *v.* Date, 1842, 3 Q. B. 609.
[5] R. *v.* Woodley, 1834, 1 M. & Rob. 390.

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§ 461.[1] The fifth[2] class of cases in which secondary evidence to prove the contents of a document is admissible, in the first place, consists of those cases in which the law raises a strong presumption of the existence of such a document. For instance, the *original written appointment to a public office* need not in general be produced, in consequence of the strong presumption of the validity thereof which arises from its undisturbed exercise, but it will be sufficient to show that any such officer has *acted* in an official capacity.[3]

§ 462.[4] The sixth[2] relaxation of the rule demanding primary proof to be given of a document before any secondary evidence of it is received, occurs where the evidence required is the result of *voluminous facts*, or of the inspection of *many books and papers*, the examination of which could not conveniently take place in court.[5] For instance, if bills of exchange have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with their habits of business, who speaks generally of the fact without production of all the bills;[6] a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts;[7] and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.[8] But the exception under consideration will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the

[1] Gr. Ev. § 92 in great part.

[2] See supra, § 428, as to what the others are.

[3] See ante, § 171. See, also, Brewster *v.* Sewell, 1820, 3 B. & Ald. 296.

[4] Gr. Ev. § 93, in great part.

[5] 1 Ph. Ev. 433. In pleading, too, a general allegation is frequently allowed, "when the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be encumbered with the length thereof": Mints v. Bethil, 1601, Cro. Eliz. 749. See R. S. C. 1883, Ord. XIX. r. 2; Ord. LXV. r. 27, subs. 20. The courts admit the same exception, and act on similar principles, if the parties to actions are numerous: Ord. XVI. r. 9. As to the provisions of the Bankers Evidence Act see ante § 439.

[6] Spencer *v.* Billing, 1812, 3 Camp. 310. If the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.

[7] Roberts *v.* Doxon, 1791, Peake, R. 83. But see Johnson *v.* Kershaw, 1847, 1 De G. & Sm. 260, where this course was not allowed by Knight Bruce, V.-C.

[8] Meyer *v.* Sefton, 1817, 2 Stark. R. 274.

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§§ 462—465.

cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness not a fact but merely an opinion or impression; for instance, the impression which the destroyed letters produced on his mind with reference to the degree of friendship subsisting between the writer and a third party.[1] In the other cases mentioned the fact in question is one which simply depends on the honesty of the witness, whereas he might, from the perusal of the documents, conscientiously draw a very different opinion or inference from that which would be drawn by a jury.

§ 463. The seventh and last class of cases in which secondary evidence of documents is admissible is in the examination of a witness on the *voire dire*, and in *preliminary* inquiries of the same nature. Owing to the modern improvements in the law as to the competency of witnesses, this rule has become practically inoperative; further discussion of it is therefore unnecessary.[2]

§ 464. We have now fully considered the general circumstances under which secondary evidence as to documents is admissible.[3] We may therefore pass on to consider the circumstances under which *secondary evidence of oral testimony* will be received. The broad proposition as to this is, it will be recollected, that such proof is only admissible where the production of primary evidence is out of the party's power. Subject to this it may be stated, as a general rule, that where a witness has given oral testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties, or those claiming under them, if such suit relate to the same subject, or substantially involve the same material questions.[4]

§ 465. This rule is now recognised by all courts of justice.[5]

[1] Topham *v.* M'Gregor, 1844, 1 C. & K. 320. See Taylor *v.* Carpenter, 1846, 2 Woodb. & M. 5 (Am.).

[2] See 1st edit. of this work, § 342; and cases cited in this edit., post, § 1393.

[3] See ante, § 428.

[4] B. N. P. 239—243; Mayor of Doncaster *v.* Day, 1810, 3 Taunt. 262; Strutt *v.* Bovingdon, 1803, 5 Esp. 56; R. *v.* Jolliffee, 1791, 4 T. R. 290; Pyke *v.* Crouch, 1696, 1 Ld. Raym. 730; Wright *v.* Doe d. Tatham, 1834; 1 A. & E. 3; Glass *v.* Beach, 1833, 5 Verm. 172 (Am.); Lightner *v.* Wike, 1818, 4 Serg. & R. 203 (Am.).

[5] See Lawrence *v.* Maule, 1859, 4 Drew. 472. The rule has been extended to affidavits: Dunne *v.*

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§§ 465, 466.

However, to render secondary evidence of the testimony of a witness admissible, it must be proved that the witness was *duly sworn* in some judicial proceeding, to the authority of which the party against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*. If this were not the rule, the preposterous consequence would follow, that secondary evidence of testimony might be received under circumstances that would exclude the testimony itself. Therefore, should it appear that depositions were taken, either by parties not legally authorised to take them,[1] or without the sanction of an oath or affirmation, or in the absence of the party against whom they are offered,[2] when, as in most criminal investigations,[3] his presence was requisite, they cannot be received.[4]

§ 466. But although it is necessary that the party, against whom depositions are offered in evidence, should have had an opportunity of being present at the examination, and of cross-examining the witness,[5] yet it is by no means requisite that he should have exercised that power. If, for example, notice has been given to him of the time and place of an examination on commission, and he neither intimates a wish to cross-examine, nor applies to the court to enlarge the time for that purpose, it will be presumed that he has acted advisedly, and the depositions will be received.[6]

English, 1874, L. R. 18 Eq. 524. See, also, Parker *v.* M'Kenna, 1874, 43 L. J. Ch. 802, and Meyrick *v.* James, 1877, 46 L. J. Ch. 579.

[1] 12 Vin. Ab. Ev. A. b. 31; B. N. P. 241; Clay *v.* Stephenson, 7 A. & E. 185.

[2] The admissibility of depositions taken before a coroner, in the absence of the accused, will be discussed hereafter. See post, § 494.

[3] See post, § 479.

[4] In R. *v.* Eriswell, 1790, 3 T. R. 721.

[5] Att.-Gen. *v.* Davison, 1825, M'Cl. & Y. 60. If, therefore, a commission be executed without any notice, or without a sufficient notice (Fitzgerald *v.* Fitzgerald, 1863, 33 L. J. P. & M. 39, being given to the opposite party, to enable him, if he pleases, to put cross-interrogatories, the depositions will be rejected: Steinkeller *v.* Newton, 1840, 1 Scott, N. R. 148; Scott *v.* Van Sandau, 1844, 8 Jur. 1114, Q. B.

[6] In Cazenove *v.* Vaughan, 1813, 1 M. & Selw. 4, the examinations taken under the order were held to be admissible in evidence, although the defendant had received no notice of the time and place of taking them: McCombie *v.* Anton, 1843, 6 M. & Gr. 27, where a defendant, after joining plaintiff in obtaining a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination, upon which plaintiff sent him word that he should apply for a commission ex parte, and had done so, and obtained one. See, also,

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§ 467. 467.[1] The admissibility of this secondary proof of oral testimony seems to turn rather on the right to cross-examine than upon the precise identity, either (if the opponent be substantially the same) of the parties or of the points in issue, in the two proceedings.[2] Consequently, the evidence taken on the first trial is admissible on a second trial if, although the two trials be not between the same parties, the second trial is between those who represent the former parties, and claim through them by some title acquired subsequently to the first trial;[3] if in a dispute respecting lands any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relate to other lands,[4] and, in criminal cases, a deposition taken on a charge either of assault and robbery, or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder, where the two charges relate to the same transaction;[5] for, if this were not the law, the depositions of the deceased would, in many cases of homicide, be most improperly excluded.[6] Thus, where a prisoner, who had been summarily convicted of an assault, was, in consequence of the death of the party struck, subsequently indicted for murder, the convicting magistrate was permitted to state what the deceased had sworn in the prisoner's presence, the examination not having been reduced into writing;[7] on another indictment for murder, a deposition of the deceased taken on a prior charge of larceny against the accused was read.[8]

Whyte *v.* Hallett, 1859, 28 L. J. Ex. 208.

[1] Gr. Ev. § 164, in part.

[2] Wright *v.* Doe *d.* Tatham, 1834, 1 A. & E. 3, where the evidence of a witness who had testified in a suit, wherein A. and several others were plaintiffs and B. defendant, was, after his death, held admissible in a subsequent action relating to the same matter, brought by B. against A. alone.

[3] Com. Dig. Ev. A. 5, explained by Littledale J., in Doe *v.* Derby, 1834, 1 A. & E. 790; Doe *v.* Powell, 1852, 3 C. & K. 323.

[4] Doe *v.* Foster, 1834, 1 A. & E. 791, n.; Llanover *v.* Homfray, 1880, 19 Ch. D. 224.

[5] R. *v.* Smith, 1817, R. & R. 339; R. *v.* Lee, 1864, 4 F. & F. 63; R. *v.* Dilmore, 1852, 6 Cox, C. C. 52; R. *v.* Beeston, 1855, 24 L. J. M. C. 5; R. *v.* Williams, 1871, 12 Cox, C. C. 101.

[6] 2 Stark. R. 212 (1817), note by the reporter.

[7] R. *v.* Edmunds, 1833, 6 C. & P. 164 (Tindal, C.J.). The learned judge appears, however, to have received the evidence, not as proving the facts, stated, but as producing an answer from the prisoner.

[8] R. *v.* Buckley, 1873, 13 Cox. C. C. 293. This, however, was allowed not as any evidence of the

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§ 468. If, however, the point in issue, though very similar, was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded. On this ground a deposition taken on a charge of assault was afterwards rejected on an indictment for wounding;[1] again,[2] in America, where the issue in one action had been upon a common or free fishery, and that in another action was upon a several fishery, evidence of what a witness, since deceased, had sworn upon the former trial, has been held inadmissible.[3]

§ 469. In stating that this rule mainly depends on the opportunity given for cross-examination, it must however be carefully noted that though a party may have had the right of cross-examining a witness, he will be liable to have the statement of that witness adduced against him in a subsequent action, only in the event of *his opponent being substantially the same in both suits*.[4] For, unless this be the case, the adversary in the second suit has had no power to offer evidence in his own favour.[5]

§ 470. In a civil case, R. S. C., 1883, Ord. XXXVII. r. 25, provides "all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the *same cause or matter*"; but in a Chancery action, where it is intended to read, upon further consideration, evidence which has been used at chambers, notice of such intention must first be given to the other side.[6]

§ 471. Subject to the above rule, secondary evidence or oral testimony cannot (as has already been stated) be received. An attempt made some years ago in equity to engraft an exception on this rule—and to say that whenever depositions have been taken not strictly in the same matter, but against a party in one

facts deposed, but simply as affording a motive for revenge on the part of the prisoner.

[1] R. *v.* Ledbetter, 1850, 3 C. & K. 108, commented upon, however, in R. *v.* Beeston, 1855, 24 L. J. M. C. 5.

Gr. Ev. § 164.

[3] Melvin *v.* Whiting, 1828, 7 Pick. 79 (Am.); Jackson *v.* Winchester, 1800, 4 Dall. 206 (Am.).

[4] Morgan *v.* Nicholl, 1866, L. R. 2 C. P. 117.

[5] Doe *v.* Derby, 1834, 1 A. & E. 790.

[6] Re Chennell, 1877, 8 Ch. D. 492.

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§§ 471—478. suit, who is also a party to a second suit, wherein substantially the same questions arise, such depositions are as against him admissible in the second suit without any proof that the witnesses are dead, or for other good reasons incapable of being examined[1] —entirely failed.[2]

§§ 472—8. The common law (apart from the rule above cited) regards a witness as incapable of being called,[3]—1, When reasonable evidence is tendered to show that he is dead;[4] 2, When he is out of the jurisdiction of the court, or possibly, when he cannot be found after diligent enquiry;[5] 3, When he is

[1] As to what constitutes this, see next section.

[2] Blagrave *v.* Blagrave, 1847, 16 L. J. Ch. 346. The cases of Nevil *v.* Johnson, 1703, 2 Vern. 447; Barstow *v.* Palmes, 1704, Prec. in Ch. 233 (in both which cases it is not clear that the witnesses were alive); Byrne *v.* Frere, 1828, 2 Moll. 157 (where the witnesses were clearly dead); and City of London *v.* Perkins, 1734, 3 Bro. P. C. 602 (where the decision of the House of Lords does not touch this point), and which were relied on for that purpose, do not, when carefully and critically examined, afford any authority for the contrary. See, also, Carrington *v.* Cornock, 1829, 2 Sim. 567; see, and compare, 3 Br. P. C. and 24 Lords' Journ. 248 (28th January, 1734).

[3] In which case only is his evidence on oath in a prior suit between the same parties admissible: supra, § 464.

[4] Pyke *v.* Crouch, 1696, 1 Ld. Raym. 730. The court, however,—unless some account of the death of a witness be given, or at least some evidence be furnished showing that proper inquiries have been made, and that no tidings can be heard of him,—will not presume his death, so as to admit his deposition, though taken as much as fifty years before: Benson *v.* Olive, 1732, 2 Str. 919. See ante, § 297.

[5] This is clear where it is proved that the witness is actually residing in some place *beyond the jurisdiction* of the court: Fry *v.* Wood, 1731, 1 Atk. 445. But questions sometimes arise respecting the amount and nature of the proof required to establish this fact. Thus, if a witness has been examined on interrogatories by consent, on account of expected absence, it is not absolutely necessary that he should be on his voyage when the trial comes on. If the ship has sailed, though it has put back, or if the witness has gone on board, and was ready to sail, though prevented by contrary winds, that is sufficient: Fonsick *v.* Agar, 1807, 6 Esp. 92. But see Carruthers *v.* Graham, 1841, 10 L. J. Q. B. 364, cited post, § 517. For instance, secondary evidence was admitted where the witness had sailed for Spain, had been driven back by stress of weather, and six days before the trial was at Falmouth, expecting to sail again immediately: Ward *v.* Wells, 1809, 1 Taunt. 461. See Varicas *v.* French, 1849, 2 C. & K. 1008. But where it was only sworn that the witness was a seafaring man, and some six months before the trial had belonged to a ship lying in the Thames, this evidence was rejected as too vague, though possibly admissible, if it could be further shown that any efforts had been recently made to find him: Falconer *v.* Hanson, 1808, 1 Camp. 171. This case suggests the propriety of noticing an old decision of the time of James the First (Godb. 386), in which it was expressly laid down that, if a party *cannot find* a witness, then he is, as it were, dead to him; and his depositions in a cause betwixt the same parties may be read, provided the party make oath that he endeavoured to find him,

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either insane, or seriously sick;[1] and 4, when it is proved to the § 478.

but could neither see him nor hear of him. In no modern case has precisely the same point been ruled; but as it has frequently been held that proof of inability to find an attesting witness will let in evidence of his handwriting (Kay *v.* Brookman, 1828, 3 C. & P. 555; Cunliffe *v.* Sefton, 1802, 2 East, 183; Crosby *v.* Percy, 1808, 1 Taunt. 364; Ld. Falmouth *v.* Roberts, 1842, 11 L. J. Ex. 180; Parker *v.* Hoskins, 1810, 2 Taunt. 223; Burt *v.* Walker, 1821, 4 B. & Ald. 697; Spooner *v.* Payne, 1847, 16 L. J. C. P. 225), these analogous decisions would seem in some degree to support the correctness of the old authority, at least so far as relates to civil causes.

A similar latitude is not allowable in criminal proceedings, and the deposition of a witness, whether taken before a magistrate or a coroner, will not be rendered admissible, on mere proof that the witness himself cannot be found after diligent search: Ld. Morley's case, 1666, Kel. J. 55 (all the Judges); R. *v.* Scaife, 1851, 20 L. J. M. C. 229. Neither will it be received, though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, being a foreigner, he had, since the prisoner was committed for trial, returned to his own country, and was at the time of the trial resident abroad: R. *v.* Austen, 1856, 25 L. J. M. C. 48; R. *v.* Hagan, 1837, 8 C. & P. 167. These cases overrule the law as laid down in B. N. P. 242. This kind of evidence has also been rejected in America, both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining state (Wilbur *v.* Selden, 1826, 6 Cowen, 162 (Am.)), and where he was proved to have left the state, after being summoned to attend at the trial: Finn's case, 1827, 5 Rand. 701 (Am.).

How far *answers to inquiries* respecting the witness are admissible to prove that he cannot be found, is not very clearly defined. That such answers will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad, is beyond all doubt (Robinson *v.* Markis, 1841, 2 M. & Rob. 375; Doe *v.* Powell, 1836, 7 C. & P. 617); but where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem, both on principle and authority, that the answers should be received as forming a prominent part of the very point to be ascertained: Wyatt *v.* Bateman, 1836, 7 C. & P. 586; Burt *v.* Walker, 1821, 4 B. & Ald. 697; Austin *v.* Rumsey, 1849, 2 C. & Kir. 736. In order to show that inquiries have been duly made at the house of the witness, his declarations as to where he lived cannot be received (Doe *v.* Powell, 1836, 7 C. & P. 617); neither will his statement in the deposition itself, that he is about to go abroad, render it unnecessary to prove that he has put his purpose in execution: Proctor *v.* Lainson, 1836, 7 C. & P. 631.

[1] If he be proved at the trial to be *insane*, the witness's deposition will be admissible (as to depositions taken by committing justices, see post, § 479A), in like manner as if he were dead (R. *v.* Eriswell, 1790, 3 T. R. 720, 721); and the same rule is stated to prevail, though the insanity be only of a temporary character: R. *v.* Marshall, 1841, C. & Marsh, 147 (Ludlow, S., after consulting Coltman, J.). This, however, appears to be carrying the doctrine beyond its legitimate extent; for since the casual illness of a witness will not—as shown below—warrant the reading of his former testimony, at least in a civil suit, but will only furnish good ground for moving to postpone the trial, the same rule should surely prevail in the event of a witness being afflicted with temporary madness. No sensible distinction can be drawn between the two cases. Where depositions are tendered on the ground of the witness being insane, it may sometimes be advisable to show that his intellect was sound at the time of his previous examination; and if such examination were had but a short time before the trial this course may even be necessary; R. *v.* Wall, 1830, 3 Russ. C. & M. 525, 534, 4th edit.

It is somewhat difficult to discover

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§§ 478, 479.

satisfaction of the court that he is kept out of the way by the contrivance of the opposite party.[1]

§ 479. The Legislature has moreover also expressly provided that, in certain cases, certain depositions should, under particular circumstances, be received in evidence.[2]

from the authorities what *degree of illness* must be proved in order to let in depositions: R. *v.* Bull, 1871, 12 Cox, C. C. 31. See R. S. C. 1883, Ord. XXXVII. r. 18, cited post, § 506. In an old case, where a witness on his journey to the place of trial was taken so ill as to be unable to proceed, his deposition was allowed to be read (Luttrell *v.* Reynell, 1677, 1 Mod. 284); but too much weight must not be given to this decision, since, if the course there adopted were ordinarily allowed, there would be very sudden indispositions and recoveries: Harrison *v.* Blades, 1813, 3 Camp. 458; Jones *v.* Brewer, 1811, 4 Taunt. 47. The rule laid down by Lord Ellenborough, that where a witness is taken ill, the party requiring his testimony should move to *put off the trial*, is certainly less open to objection and abuse: Harrison *v.* Blades, 1813, 3 Camp. 458. In the criminal courts this practice has long prevailed, and it has there been expressly decided, that the depositions of a woman who was so near her confinement as to be unable to attend a trial could not be received: R. *v.* Savage, 1831, 5 C. & P. 143; R. *v.* Butcher, [1900] 64 J. P. 808 (Darling, J.); see post, § 481. If, however, from the nature of the illness or other infirmity no reasonable hope remains that the witness will be able to appear in court on any future occasion, his deposition is certainly admissible in criminal (11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 17, cited post, § 479; R. *v.* Hogg, 1833, 6 C. & P. 176; R. *v.* Edmunds, 1833, 6 C. & P. 164; R. *v.* Wilshaw, 1841, C. & Marsh. 145; R. *v.* Cockburn, 1857, 19 L. J. M. C. 119), as it is in civil, proceedings (Jones *v.* Jones, 1785. 1 Cox, Ch. 184; Andrews *v.* Palmer, 1812, 1 Ves. & B. 22; Fry *v.* Wood, 1731, 1 Atk. 445; Corbett *v.* Corbett, 1813, 1 Ves. & B. 335. The case of Doe *v.* Evans, 1827, 3 C. & P. 219, where Vaughan, J., is said to have rejected the depositions of a witness, who was bedridden, and nearly a century old, and quite unable to attend the trial, is obviously not law. Where, upon an issue being directed out of the old Court of Chancery, it appeared that a witness, who had been examined in the cause as to the handwriting of certain documents, had since become *blind*, the court made an order that his depositions should be read at the trial: Lynn *v.* Robertson, 1823, 1 L. J. Ch. 83.

[1] The proposition that, if a witness be *kept out of the way* by the adversary, his former statements on oath will be admissible, rests partly on the authority of several decisions both in the civil and criminal courts (Ld. Morley's case, 1666, Kel. J. 55 (all the Judges); R. *v.* Harrison, 1692, 12 How. St. Tr. 851; Green *v.* Gatewick, 1673, Bull. N. P. 243; R. *v.* Scaife, 1851, 20 L. J. M. C. 229; R. *v.* Guttridge, 1840, 9 C. & P. 473. See, also, Egan *v.* Larkin, 1842, 1 Arm. M. & O. 403 (Ir.)); partly on the analogies furnished by one or two statutes (see 50 G. 3, c. 102, § 5 (Ir.); 56 G. 3, c. 87, § 3 (Ir.), noticed post, § 497); but chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposition might be read in evidence as against the man who had kept out of the way, but that it could not be received against the other two men: R. *v.* Scaife, 1851, 20 L. J. M. C. 229.

[2] See, as to depositions in criminal cases, supra, § 479A; as to depositions in bankruptcy cases, infra, § 496; and as to certain special cases,

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§ 479a

§ 479A. Depositions taken in criminal cases in pursuance of "The Indictable Offences Act, 1848,"[1] are made secondary evidence if the witness be (1) dead, (2) so ill as to be unable to travel. The Act in question provides, "That in all cases, where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high sea, or on land beyond the sea, or whether such person appear voluntarily, upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, *in the presence of such accused* person, who shall be at liberty to put questions to any witness produced against him, take the statement[2] on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be *read over* to and *signed* respectively by the *witnesses* who shall have been so examined, and shall be *signed* also by the *justice* or justices taking the same; and the justice or justices, before whom any any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, adminster to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if,

infra, § 497 (as to Ireland), and § 499 (as to India and the colonies); and as to those in ordinary civil cases, taken on commission, infra, § 505; and as to those filed in answer to interrogatories, §§ 521 et seq. For another and special instance, see "The Fugitive Offenders Act, 1881" (44 & 45 V. c. 69), § 29, cited post, § 1562.

[1] 11 & 12 V. c. 42, § 17.

[2] The form given in Sched. M. to the Act is as follows:—

Depositions of Witnesses.

"To Wit,—The Examination of C. D., of [*Farmer*], and E. F., of [*Labourer*], taken on [*oath*] this day of , in the year of our Lord at , in the [*county*] aforesaid, before the undersigned, [*one*] of Her Majesty's justices of the peace for the said [*county*], in the presence and hearing of A. B.; who is charged this day before [*me*], for that he the said A. B. on at [&c., *describing the offence as in a warrant of commitment*]. This deponent C. D. on his [*oath*] saith as follows [&c. *stating the deposition of the witness as nearly as possible in the words he uses. When his deposition is complete, let him sign it*].

And this deponent E. F. upon his oath saith as follows [&c.].

The above depositions of C. D. and E. F. were taken and [*sworn*] before me at on the day and year first above mentioned. T. S."

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§§ 479a—481. upon the trial of the person so accused as first aforesaid, it shall be proved, by the oath or affirmation of any credible witness, that any person whose depositions shall have been taken as aforesaid, is *dead*, or *so ill as not to be able to travel*, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity[1] of cross-examining the witness, then, if such deposition *purport* to be *signed* by the *justice* by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

§ 480. Although the above enactment only renders his deposition admissible if the witness be "dead, or so ill as not to be able to travel," the maxim, "expressio unius est exclusio alterius," has no application, and it does not abrogate the common-law rule,[2] that if a witness be fraudulently or forcibly kept out of the way by the prisoner himself, his deposition ought to be received.[3] Whether the courts will go one step further, and admit the deposition of a witness, who, although not too ill to travel,[4] may be proved to be permanently insane,[5] remains to be seen; but such a decision seems naturally to follow from the former ruling.

§ 481. Some judges consider (though this is not clear) that the statute does abolish, however, the old common-law rule that[6] a prosecutor ought to apply for a postponement of the trial, where a material witness is only suffering under a *temporary* indisposition. Accordingly, such judges have, under the statute,

[1] This fact may be negatived by proof that the accused was insane when the deposition was taken, or was otherwise incapacitated by illness from cross-examining the deponent: R. *v.* Peacock, 1870, 12 Cox, C. C. 21.

[2] Ante, §§ 472-8.

[3] R. *v.* Scaife, 1851, 20 L. J. M. C. 229.

[4] When a witness is able to travel without risk, her old age and nervousness and inability to stand a cross-examination will not justify the reading of her deposition: R. *v.* Farrell, 1874, L. R. 2 C. C. R. 116; R. *v.* Thompson, 1876, 13 Cox, C. C. 181.

[5] Ante, note [1], p. 359, supra. In R. *v.* Cockburn, 1857, 19 L. J. M. C. 119, the deposition of a witness was received, on his doctor proving that, though he might have been brought to the court without danger to life, he was suffering from paralysis, which disabled him altogether from giving evidence. See, also, R. *v.* Wilson, 1861, 8 Cox, C. C. 453.

[6] Ante, note [3] to §§ 472-8.

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admitted the deposition of a woman who, when the trial took place, had just been confined.[1] But other judges think that a confinement (which after all is but a natural state) is not "illness" within the meaning of that word or the statute.[2]

§ 482. The statute, too, apparently authorises the reading of the deposition on its being merely proved that the witness is dead, or too ill to travel; that he was examined in the presence of the accused, who had a full opportunity of cross-examining him; and that the document purports to be signed, either by the committing justice, or by the justice "by or before whom the same purports to have taken place."[3] Possibly, however, it is also necessary for the prosecutor to further prove all or some of the following facts, viz., that the deposition was taken before the accused was committed or bailed; that it was taken on oath or affirmation; that it was read over to the witness, and that it was signed by him. For it may be contended that the section set out above enumerates all these circumstances as apparently necessary ingredients in a valid deposition; and then, in the paragraph relative to the proof, speaks, first, of "the person, whose deposition *shall have been taken as aforesaid*," being dead, &c., and next, of "*such*[4] deposition" purporting to be signed by the justice,

[1] Thus in R. *v.* Stephenson, 1862, 31 L. J. M. C. 147; and R. *v.* Harvey, 1850, 4 Cox, C. C. 441, the court admitted the deposition of a woman, who was daily expecting her confinement, and was "otherwise poorly." See, too, R. *v.* Croucher, 1862, 3 F. & F. 285; R. *v.* Wilson, 1874, 12 Cox, C. C. 622; R. *v.* Heesom, 1878, 14 Cox, C. C. 14, 40; and R. *v.* Goodfellow, 1879, 14 Cox, C. C. 326; R. *v.* Wellings, 1878, 3 Q. B. D. 426. In these last three cases the woman was daily expecting her confinement.

[2] R. *v.* Wilton, 1858, 1 F. & F. 309; R. *v.* Walker, 1859, 1 F. & F. 534; R. *v.* Parker and Ashworth, York Summer Assizes, 1862 (Mellor, J., saying that the general opinion of the bench was with him); R. *v.* Omant, 1854, 6 Cox, C. C. 466; and see R. *v.* Butcher, 1900, 64 J. P. 808 (Darling, J.). And at all events from R. *v.* Tait, 1861, 2 F. & F. 553; and other cases in this note, it appears that the judge, notwithstanding the Act, has a discretionary power of postponing the trial (which some judges habitually exercise), instead of allowing the deposition to be read.

[3] In R. *v.* Vidil, 1861, 9 Cox, C. C. 4, Blackburn, J., held the deposition of a sick witness admissible, though it had been taken before two magistrates who acted only on that occasion, and the prisoner had been charged before and committed by another magistrate, and the same course was adopted by Darling, J. in R. *v.* Katy, 1900, 64 J. P. 807. In R. *v.* Holloway, 1901, 65 J. P. 712 (Wills, J.), the magistrate who took the deposition was a member of the bench who subsequently committed the accused, but the learned judge in admitting the deposition did not rest his decision on that ground.

[4] As to the meaning of the word "such," see Ld. Brougham in Casement *v.* Fulton, 1845, 5 Moo. P. C. C. 140, P. C.

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§§ 482—484. while in the form of deposition provided the justice merely states that the witness was examined on oath, and in the presence of the accused, and such form is wholly silent as to whether or not the examination was read over to the witness, or was signed by him.[1]

§ 483. It is submitted that while "omnia præsumuntur rite esse acta," a deposition will be rendered inadmissible if the prisoner can show affirmatively that the signature, purporting to be that of the justice, is a forgery, or even that the deposition was not taken upon oath, or that it was not read over to the witness, or that the signature purporting to be that of the witness was not made by him, or that the witness had refused or omitted to sign the statement.

§ 484. A few words as to the *proper course of taking depositions* under the Act, so as to render them admissible in evidence, will probably prove useful here. To render depositions admissible, it is apparently necessary that the accused should, when they were taken, have been charged with some indictable offence; that the statement of each witness should have been made under the sanction of an oath or affirmation, administered by a magistrate;[2] that such oath or affirmation should have been administered in the presence of the accused; that the statement should have been made entirely in his presence,[3] and that he should have had full opportunity for cross-examination; that the whole of the statement elicited either by examination or by cross-examination, and not merely so much of the evidence as the justice might consider *material*,[4] should have been reduced to writing in the first person, and in the very words of the witness;[5] that the deposition, when completed, should have been read over to the witness, and signed

[1] In R. *v.* Holloway, supra, a deposition otherwise taken in the form provided by the Act, was admitted although not signed by the witness, the witness at the time of taking the deposition having her hands covered with bandages which it would have been harmful to her to remove, and which prevented her signing or making her mark.

[2] See R. *v.* Vidil, 1861, 9 Cox, C. C. 4, cited ante, § 482, n. [8].

[3] The same doctrine prevailed at common law. See R. *v.* Errington, 1838, 2 Lewin, C. C. 142; R. *v.* Woodcock, 1789, 1 Leach, 504; R. *v.* Dingler, 1791, 2 Leach, 561; R. *v.* Paine, 1695, 1 Salk. 281; cited with approbation (Ld. Kenyon) in R. *v.* Eriswell, 1790, 3 T. R. 721.

[4] This was the old law. See 7 G. 4, c. 64, §§ 2 and 3 ("The Criminal Law Act, 1826").

[5] See Sched. M. cited ante, § 483A. n. 1.

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by him, as a token of his assenting to its correctness;[1] that the whole body of the depositions, if not each deposition,[2] should also be signed by the justice; and that they should have been transmitted by him,—together with the written information, the statement of the accused, and the recognizance of bail, if any such documents should exist, — to the proper officer of the court in which the trial is to be had, before or at the opening of such court.[3] Depositions have been admitted under this Act, when taken by a magistrate at a hospital in the presence of the accused, on it appearing that the accused had an opportunity of cross-examining the witness and that the necessary forms had been complied with, even though it appeared that at the time the deposition was taken it was intended to be in accordance with 34 & 31 Vict. c. 35 § 6.[4]

§ 485. The Legislature, in directing the magistrate to take down the statements of the witnesses as nearly as possible in their own words, and not merely "so much thereof as shall be material," of course did not intend the depositions to be loaded with every idle word let fall by the persons under examination, and with expressions obviously having no reference to the charge against the accused. But it certainly meant to fetter the discretion of the justices, who, under the old law, were apt to reject as immaterial much valuable information. For facts which on a preliminary inquiry appear to be of trifling importance, turn out often to be extremely relevant; and where all the evidence is not given, the court, the prosecutor, and the prisoner, are alike kept in the dark, and much time may be wasted in endeavours to throw discredit upon the testimony of witnesses, by showing that they have made statements at the trial which are not to be found in the depositions returned.[5] If a person of weak intellect, or a child, be examined before the justice, it is also desirable that the

[1] See R. *v.* Plummer, 1844, 1 C. & K. 604; R. *v.* Fleming, 1799, 2 Leach, 854; but see R. *v.* Holloway, 1901, 65 J. P. 712 (Wills, J.).

[2] See § 487, post.

[3] See §§ 17 and 20 of 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848").

[4] R. *v.* Holloway, supra; and see R. *v.* Katy, 1900, 64 J. P. 807, supra. For the provisions of 30 & 31 V. c. 35, § 6, see post, § 491.

[5] R. *v.* Potter, 1829, 7 C. & P. 650, n.; R. *v.* Thomas, 1837, 7 C. & P. 817; R. *v.* Grady, 1836, 7 C. & P. 650; R. *v.* Smith, 1845, 2 C. & K. 207; R. *v.* Weller, 1846, 2 C. & K. 223.

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§§ 485—487.

questions and answers touching his capacity to take an oath, should appear on the face of the deposition.[1]

§ 486. Whether a deposition originally written down in the absence of the prisoner can be received in evidence under the Act, on proof being given that it had afterwards been read over in his presence to the witness, who had then assented on oath to its contents, is very problematical. Although depositions, thus laxly taken, have more than once been admitted under the old law,[2] this course of proceeding has frequently been condemned by judges as highly unjust:[3] and, indeed, it is obvious that it affords no fair opportunity to the accused of cross-examining the deponent. On one occasion, Platt, B., rejected a deposition expressly upon this ground, remarking that a prisoner could not have "a full opportunity of cross-examining the witness," within the meaning of the statute, unless the deposition was taken down in his presence, and in the presence of the magistrate, and unless he was warned by the magistrate at the close of the examination that he might put any questions he liked to the witness, with reference to the statement which had been made.[4] It also is extremely doubtful whether a deposition can be read in a case where the prisoner has abstained from asking any questions in consequence of the witness being too ill to bear further examination.[5]

§ 487. As to the mode in which depositions should be entitled, one caption at the head of the whole body of depositions will suffice,[6] if, indeed, it be necessary, in strict law,[7] to have a caption at all;[8] and no objection can be sustained on the ground that the title does not state with sufficient precision the charge against

[1] R. *v.* Painter, 1846, 2 C. & K. 319.

[2] R. *v.* Smith, 1817, R. & R. 339; R. *v.* Calvert, 1848, 2 Cox, C. C. 491; R. *v.* Walsh, 1850, 5 Cox, C. C. 115. See R. *v.* Christopher, 1849, 2 C. & K. 994.

[3] R. *v.* Johnson, 1846, 2 C. & K. 394; R. *v.* Forbes, 1814, Holt, N. P. 599, n.; R. *v.* Kiddy, 1824, 4 D. & R. 734; R. *v.* Calvert, 1848, 2 Cox, C. C. 491; R. *v.* Walsh, 1850; R. *v.* Beeston, 1854, 24 L. J. M. C. 5. See, also, R. *v.* Crother, 1786, 1 T. R. 125.

[4] R. *v.* Day, 1852, 6 Cox, C. C. 55. See R. *v.* Bates, 1860, 2 F. & F. 317; R. *v.* Watts, 1864, 33 L. J. M. C. 63.

[5] R. *v.* Hyde, 1848, 3 Cox, C. C. 90; and see R. *v.* Mitchell, 1892, 17 Cox, C. C. 503, cited post, § 491.

[6] R. *v.* Johnson, 1847, 2 C. & K. 355.

[7] See, however, R. *v.* Newton, 1859, 1 F. & F. 641; and R. *v.* Galvin, 1865, 16 Ir. C. L. R. 452, where the point almost equally divided the Irish judges.

[8] R. *v.* Langbridge, 1849, 18 L. J. M. C. 198.

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§§ 487, 488.

the accused.[1] Although each witness must sign his own deposition, it will be sufficient for the magistrate to attach his signature, once for all, at the end of the whole body of depositions, provided that all of them be written either on one sheet of paper,[2] or on different sheets connected with each other.[3] Still, if the depositions be copied on separate sheets, and no proof be given of their having been pinned or otherwise fastened together, at or before the time when the last was signed,[4] those bearing no signature will be rejected.[5] The signature of the justice must seemingly appear on the face of the deposition to be that of the magistrate "by, or before, whom the same purports to have been taken," and no parol evidence can supply any omission on this head.[6] Depositions, when admissible under the Act, may be read in evidence before the grand jury as well as at the actual trial.[7]

§ 488. It is no longer necessary (as formerly) to verify the signature of the magistrate taking the deposition, but proof must be adduced "that the deposition was taken in the presence of the accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witness." Either the justice, clerk or at least some person who was present during the whole inquiry,[8] must be forthcoming, to show that the requirements of the law have been duly complied with. When a deposition is sought to be read on the ground of the sickness of the witness, it must, of course, be further proved that he is at the actual time of the trial too ill to travel. The judges require this fact to be strictly established.[9] Mere proof that the witness was confined to his bed some days before will not suffice;[10] and, as a general

Id

[2] R. *v.* Young, 1850, 3 C. & K. 106; R. *v.* Osborne, 1837, 8 C. & P. 113.

[3] R. *v.* Parker, 1870, L. R. 1 C. C. R. 225; overruling R. *v.* Richards, 1866, 4 F. & F. 860. See, also, R. *v.* Carrol, 1869, 11 Cox. C. C. 322.

[4] See R. *v.* Lee, 1864, 4 F. & F. 63.

[5] R. *v.* France, 1839, 2 M. & Rob. 207.

[6] R. v. Miller, 1850, 4 Cox, C. C. 166.

[7] R. *v.* Clements, 1851, 20 L. J. M. C. 193.

[8] See R. *v.* Wilshaw, 1841, C. & Marsh, 145; R. *v.* Wilson, 1874, 12 Cox, C. C. 622.

[9] See R. *v.* Harris, 1850, 4 Cox, C. C. 440; R. *v.* Ulner, 1850, 4 Cox, C. C. 442; R. *v.* Riley, 1851, 3 C. & K. 116. See, also, R. *v.* Day, 1852, 6 Cox, C. C. 55; R. *v.* Butcher, 1900, 64 J. P. 808 (Darling, J.).

[10] R. *v.* Riley, 1851, 3 C. & K. 116; R. *v.* Williams, 1865, 4 F. & F. 515 (Pigott, B.).

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§§ 488—491.

rule, it will be prudent,[1] though it is not absolutely necessary,[2] to have the testimony of a medical man.

§ 489. As already mentioned,[3] a deposition will be admissible under the Act, though taken upon a charge technically different from that in respect of which the accused is afterwards indicted, provided that on the former inquiry a full opportunity of cross-examination has been afforded to him. For instance, the deposition of a deceased person taken on a charge against the prisoner of having stabbed him, or done him some grievous bodily harm, can be read on a subsequent trial for his murder or manslaughter.[4]

§ 490. In addition to the regulations considered above,[5] an Act of 1867[6] contains two important enactments on this subject. The first[7] provides in substance that every person, who is charged before a justice with an indictable offence, shall be asked whether he desires to call any witnesses; and, if he does so, the justice in his presence shall examine such witnesses on oath, and reduce their statements to writing. The depositions thus taken shall then be read over to the witnesses and signed by them, and shall also be countersigned by the justice, and "transmitted in due course of law;" and, afterwards, upon the trial, all the laws relating to the depositions of witnesses for the prosecution shall apply to these depositions.

§ 491. The other enactment,[8] after reciting the provisions of the Indictable Offences Act, 1848, which have been already set out, further recites that it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition, taken in accordance with the provisions of the said Act, of a witness. "It may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused

[1] R. *v.* Riley, 1851, 3 C. & K. 116; R. *v.* Welton, 1862, 9 Cox, C. C. 297; R. *v.* Williams, 1865, 4 F. & F. 515.

[2] R. *v.* Stephenson, 1862, 31 L. J. M. C. 147; R. *v.* Croucher, 1862, 3 F. & F. 285.

[3] Ante, § 467.

[4] R. *v.* Beeston, 1854, 24 L. J. M. C. 5; R. *v.* Dilmore, 1852, 6 Cox, C. C. 52; R. *v.* Lee, 1864, 4 F. & F. 63; R. *v.* Williams, 1871, 12 Cox, C. C. 101. See R. *v.* Clarke, 1859, 2 F. & F. 2.

[5] Under § 17 of 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848").

[6] 30 & 31 V. c. 35.

[7] Id. § 3.

[8] Id. § 6.

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"thereof," and "it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it

§ 491.

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§§ 491, 491a.

"be proved to the satisfaction of the court that reasonable notice[1] of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same."[2]

§ 491A. The Prevention of Cruelty to Children Act, 1904,[3] provides for the taking by a justice of the deposition of a child in respect of whom an offence of cruelty under the Act, or any of the offences mentioned in the First Schedule of the Act,[4] is alleged to have been committed where the justice is satisfied by the evidence of a registered medical practitioner that the attendance of the child before a court would involve serious danger to its life or health. It also provides for the admission in evidence of such deposition or of any deposition of the child taken under the Indictable Offences Act, 1848, or the Petty Sessions (Ireland) Act, 1851, on the trial of any person for an offence of cruelty under the Act or for any of the offences mentioned in the Schedule, if the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of the child would involve serious danger to its life or health, and if the deposition purports to be signed by the justice before whom it purports to be taken, and if it is proved that reasonable notice of the intention to take the deposition has been served upon the

[1] This must be in writing: R. *v.* Shurmer, 1886, 17 Q. B. D. 323 (C. C. R.).

[2] A cross-examination stopped in consequence of the witness's illness will not suffice: R. *v.* Mitchell, 1892, 17 Cox, C. C. 503. § 7 enacts, that "whenever a prisoner in actual custody shall have served, or shall have received, notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly. . . ."

[3] 4 Ed. 7, c. 15, §§ 13, 14.

[4] These are—Any offence under §§ 27, 55 or 56 of "The Offences against the Person Act, 1861" (24 & 25 V. c. 100), and any offence against a child under the age of sixteen years, under §§ 5, 42, 43, 52 or 62 of that Act, or § 11 of the "Criminal Law Amendment Act, 1885" (48 & 49 V. c. 69); any offence under "The Dangerous Performances Acts, 1879 and 1897" (42 & 43 V. c. 34, and 60 & 61 V. c. 52); any other offence involving bodily injury to a child under the age of sixteen years.

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person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to have been present, an opportunity of cross-examining the child making the deposition. The Act further provides[1] for the admission in any proceeding against any person in respect of the offences mentioned, of a deposition under the Act or under the Indictable Offences Act or Petty Sessions (Ireland) Act, of a child of tender age who does not in the opinion of the court understand the nature of an oath, although the deposition is not given on oath, if in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Such evidence, however, to justify a conviction, must be corroborated by some other material evidence.

§ 492. The depositions of witnesses examined before the *coroner* as to a murder or manslaughter are probably admissible as secondary evidence[2] if certified and subscribed by such coroner with the recognisances, if they and also the inquisition taken before him, are delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court.

§ 493. Assuming that the above provisions as to coroners' depositions are still in force,[3] they differ materially from those which regulate the mode of taking depositions before justices, and of proving them when taken. In the first place, the coroner is only required to put in writing "so much of the evidence as shall be material;" secondly, the narrative may be drawn up in the third person; thirdly, the witness is not required to sign the document, though he usually does so for the purpose of identifying it;[4] fourthly, the deposition must, it would seem, be proved, either by calling the coroner who subscribed it, or by proving his signature thereto, and showing by his clerk, or by some

[1] § 15.

[2] See "The Coroners Act, 1887 (50 & 51 V. c. 71), § 4, sub-sect. 2. Corresponding provisions were originally contained in 7 G. 4, c. 64, § 4, and are applied to Ireland by 9 G. 4, c. 54, § 4.

[3] Possibly they are repealed by § 34 of 11 & 12 V. c. 42; as to which, however, see R. *v.* Cleary, 1862, 2 F. & F. 850. The present *practice* seems to be that coroners' depositions now stand upon the same footing as depositions taken before magistrates, and all the provisions of 11 & 12 V. c. 42, apply. R. *v.* Butchers, 1900, 64 J. P. 808 (Darling, J.).

[4] See R. *v.* Flemming, 1799, 2 Leach, 854.

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§§ 493—495.

person who was present at the inquiry, that the requirements of the law were duly complied with.[1]

§ 494. It was at one time *said* that a striking distinction existed between depositions returned by justices and those taken by coroners, inasmuch as while (as we have seen) depositions taken before justices, to be admissible as secondary evidence against the prisoner, must have been taken in his presence, depositions taken before coroners might be received, though taken in a prisoner's absence. This doctrine, however, has not only been questioned by such modern text-writers of eminence as Starkie,[2] Phillipps,[3] and Russell,[4] but Montague Smith, J.,[5] has declined to act upon it, and the doctrine will probably be discredited by all the judges whenever it formally comes before the Court of Criminal Appeal.[6]

§ 495. Two other statutes make depositions taken either under the English Bankruptcy Act, 1883,[7] or the Irish Bankrupt and Insolvent Act, 1857,[8] admissible in evidence. The English Act provides[9] that, "in case of the *death*[10] of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a *copy* thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to." The Act further provides,[11] that "such notes" of the bankrupt's public examination "as the court thinks proper shall be taken

[1] See R. *v.* Wilshaw, 1841, C. & Marsh. 145.

[2] 2 St. Ev. 384—386.

[3] 2 Ph. Ev. 74, 75.

[4] 2 Russ. C. & M. 892, 893.

[5] In R. *v.* Rigg, 1866, 4 F. & F. 1085.

[6] See R. *v.* Wall, 1830, 3 Russ. C. & M. 525, 534, 4th ed. The doctrine that depositions taken before a coroner in a man's absence are evidence against him apparently rests on two or three decisions *temp* Charles II. (Ld. Morley's case, 1666, Kel. J. 55 (all the judges in H.L.); Bromwich's case, 1666, 1 Lev. 180; Thatcher *v.* Waller, 1675, T. Jones, 53; R. *v.* Harrison, 1692, 12 How. St. Tr. 851, when the rules of evidence were only partially understood, and appear to be capable of a far more limited interpretation; — on dicta thrown out by Ld. Kenyon and Buller, J., in R. *v.* Eriswell, 1790. 3 T. R. 721;—on a note of a case said to have been decided by Hotham, B. (R. *v.* Purefoy, 1794, Peake, Evid. 61, n., 5th ed.);—and on a ruling by Coleridge, J., Sills *v.* Brown, 1840. 9 C. & P. 601.

[7] 46 & 47 V. c. 52.

[8] 20 & 21 V. c. 60, Ir.

[9] 46 & 47 V. c. 52, § 136.

[10] The answers of a bankrupt are not—at least, during his life—made evidence in proceedings in the bankruptcy against persons other than himself: In re Brunner, 1887, 19 Q. B. D. 572.

[11] § 17, sub-sect. 8.

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"down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him."[1] The Irish Act provides[2] that, in the event of the *death* of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter, or under any petition for arrangement, his deposition, purporting to be sealed with the seal of the Court of Bankruptcy, or a *copy* thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained.

§§ 496—498. In Ireland,[3] if any person, after giving information or examination upon oath against any person for any offence, shall, before the trial, be murdered or violently put to death, or so maimed, or forcibly carried away and secreted, as not to be able to give evidence on the trial, his information or examination shall be admitted in all courts of justice in Ireland as evidence on the trial; provided[4] that the information or examination of a witness secreted shall not be evidence, unless it shall be found on a collateral issue, to be put to the *jury* trying the prisoner, that he was secreted by the person on trial, or by some person acting for him, or in his favour. By a subsequent Irish statute[5] informations, or examinations, under similar circumstances, are rendered, after similar proof, receivable in evidence before the grand jury.

§ 499. The original common law rule which required that, to constitute them evidence, the examinations of witnesses should be taken *vivâ voce* in the presence of both a jury, and of, in a criminal case, the accused, and in a civil case both parties, has in modern times been much broken in upon by sundry Acts of Parliament and rules made by statutory authority.

[1] This proviso does not preclude parol evidence of the bankrupt's evidence being given where the notes have not been signed by the bankrupt: R. *v.* Erdheim, [1896] 2 Q. B. 260; 65 L. J. M. C. 176; 74 L. T. 734; 44 W. R. 607; 3 Manson, 142; 18 Cox, C. C. 355. The notes of the bankrupt's evidence ought not to be admitted in subsequent proceedings to which the bankrupt is a party in a representative capacity: New, Prance and Garrard's Trustee *v.* Hunting, [1897] 1 Q. B. 608 (Vaughan Williams, J.); see, on appeal, [1897] 2 Q. B. 19.

[2] 20 & 21 V. c. 60, § 365, Ir.

[3] By 50 G. 3, c. 102, § 5.

[4] This is a remarkable proviso, since it differs from the ordinary rule of law on the subject, which is stated ante, § 23.

[5] 56 G. 3, c. 87, § 3.

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§§ 500, 500a.

§ 500. Evidence may be given about matters which have taken place in India or the English Colonies, or elsewhere, and have become the subject of criminal or civil proceedings in England, if such evidence be taken in accordance with certain statutory provisions which are mentioned in the footnote.[1]

§ 500A. It will be noticed that none of the statutes above referred to require the party to prove that the witnesses whose depositions he seeks to use are beyond the jurisdiction of the court at the time of the trial. Perhaps, however, principle

[1] The principal of such provisions is "The East India Company's Act, 1772" (13 G. 3, c. 63, amended by "The Statute Law Revision Act, 1888," of 51 V. c. 3, and further amended by "The Statute Law Revision Act, 1892," of 55 & 56 V. c. 19), made applicable (see Wilson *v.* Wilson, 1883, 5 P. D. 8 (C. A.)) to the Indian High Courts by 24 & 25 V. c. 104 ("The Indian High Courts Act, 1861"), §§ 10, 11. § 40 of the original Act relates to criminal proceedings in the King's Bench for offences committed in India, and gives power to the King's Bench to issue warrants to the Indian Courts in such proceedings in the King's Bench; and if under this section the Attorney-General move for a rule to order the Indian Courts to take evidence, his statement that this is necessary will be sufficient without any affidavit. See R. *v.* Douglas, 1842, 2 Dowl. (N.S.) 416; and also R. *v.* Douglas, 1846, 16 L. J. Q. B. 417. The provisions of this section were re-enacted by 24 G. 3, c. 25 ("The East India Company's Act, 1784"), § 78, and in 26 G. 3, c. 57 ("The East India Company's Act, 1786"), § 28. §§ 42 and 45 of the same Act relate to proceedings in Parliament touching offences committed in India and give the Lord Chancellor or Speaker (as the case may be) power to issue warrants to the Indian Courts to take the necessary evidence. § 44 of the Act relates to actions in the High Court in England for causes of action which arose in India, and gives such High Court in England power to issue warrants to the Indian Courts to take the necessary evidence. As to the construction of the Act generally, and in particular of the expression "cause of action," see Francisco *v.* Gilmore, 1797, 1 Bos. & P. 177; Savage *v.* Binney, 1834, 2 Dowl. 643; and Kelsall *v.* Marshall, 1856, 26 L. J. C. P. 19.

The King's Bench Division in England is authorised to try any person employed in the public service abroad, who, in the exercise or under colour of such employment, shall have committed any offence, by 42 G. 3, c. 85. The evidence on such trial may (by § 3 of the above statute, and also by § 81 of 24 G. 3. c. 25) be taken upon commission. See, as to postponement of a trial under the enactment above mentioned, R. *v.* Jones, 1806, 8 East. 31, 451.

The provisions of § 40 of "The East India Company's Act, 1772" (supra), are extended to the trials in the King's Bench Division of offences against "The Slave Trade Acts" by 6 & 7 V. c. 98, § 4 ("The Slave Trade Act, 1843") Their provisions as to taking evidence by commission are also extended to all Colonies, and to all actions (not being actions at the suit of the Crown: see R. *v.* Wood, 1841, 7 M. & W. 573, in whatever country the cause of action may have arisen, by 1 W. 4, c. 22.

The High Court of Justice in Ireland is given powers similar to those possessed by the High Court of Justice in England, by 3 & 4 V. c. 22 ("The Debtors (Ireland) Act, 1840"). As to the powers of the Scotch Courts, see 29 & 30 V. c. 112.

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requires that some slight evidence of this kind shall be given, and this view derives confirmation from Order XXXVII. r. 18.[1]

§ 501. In *criminal* proceedings a resort to the provisions of the Acts mentioned in the footnote to § 500 may even now become sometimes necessary.

§ 501A. In civil cases, however, the statutes mentioned in the footnote have been rendered practically obsolete by the provisions contained in R. S. C. Order XXXVII.[2]

§ 502. The examination of witnesses taken *de bene esse* on commission may also be contained in depositions which may be read at the trial if such depositions were taken under an order for that purpose. In order to obtain such an order the applicant must prove (*a*) that the action involves a real issue for the court to try; (*b*) that the application is bonâ fide; (*c*) that the examination will be effective; (*d*) that the witnesses to be examined are material and their evidence admissible; (*e*) that there is some good reason why the witnesses cannot be expected to appear at the trial. A good reason why a witness cannot attend the trial has been held to be that he is over seventy years of age,[3] or is dangerously ill, or is about to go abroad.[4]

§ 503. The High Court, moreover, has a general power[5] to order the examination of witnesses in any cause or matter to be taken by depositions on commission wherever it "shall appear necessary for the purposes of justice."

§ 504. Under whichever of the powers mentioned above evidence by depositions may have been taken, questions as to the admissibility of such depositions may arise in connection with the law of evidence; therefore, although it would be quite foreign to this work to give any detailed instructions as to the practice[6] to be followed in obtaining an order to take evidence on commission, it may be useful to set out a large portion of

[1] See post, § 504.

[2] Post, § 504.

[3] This rule, however, does not entitle the party to an order for the examination of a very large number of witnesses: Bidder *v.* Bridges, 1884, 37 Ch. D. 406 (C. A.), which consult generally as to examination of old witnesses *de bene esse*.

[4] Bellamy *v.* Jones, 1802, 8 Ves. 31.

[5] Under Ord. XXXVII. r. 5, set out in full, post, § 504.

[6] The practice is set out in full in Hume-Williams and Macklin's "Evidence on Commission," 2nd ed. at pp. 23 et seq.

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§ 504. R. S. C. of 1883, Order XXXVII., which practically collects in a code the powers of the High Court upon this subject. The material parts of such Order appear to be as follow:—

"Order XXXVII. Examination of witnesses.

5. The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order[1] for the examination upon oath before the court or judge or any officer of the court, or *any other person* and *at any place*, of any witness or person,[2] and may empower any party to any such cause or matter to give such deposition in evidence therein *on such terms*,[3] if any, as the court or a judge may direct.[4]

* * * * *

6A. If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. See R. S. C. Order XXXVII. r. 6A (R. S. C. October, 1884, r. 6). The Appendix to the Rules of 1884 contains (in forms 1 and 2) the forms of such order and request, which may be cited as forms 37A and 37B in Appendix.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

9. Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to

[1] The "forms of "Order for Examination of Witnesses before Trial" are given in R. S. C. 1883, App. K. Nos. 36 and 37. An order under this rule may be made ex parte, but only at the peril of the applicant: Bidder *v.* Bridges, supra.

[2] See also r. 1 of same Order, cited post, § 1395.

[3] See r. 18, post, § 504.

[4] An order under this rule can only be made where it is sought to examine witnesses. Under it the English Court has no jurisdiction to order the production of documents. Cape Copper Co. *v.* Comptoir d'Escompte, 1890, 38 W. R. 763 (C. A.). But quære whether letters of request, or any matter within the jurisdiction may not be added to the commission. See Mason and Barry *v.* Comptoir d'Escompte, 1890, 38 W. R. 685. Moreover, when no action is pending against him, and it is not necessary for the carrying out of an order already made, there is no jurisdiction under this rule to make an order against a person not a party to any pending action. See Elder *v.* Carter, 1890, 25 Q. B. D. 194 (C. A.).

Such a person may, however, be ordered, under Ord. XXXVII, r. 7, to attend an examination and produce documents in his possession, subject to his right, when attending, to make any legitimate objections to the production of the documents which one of the parties requires. In re Smith, [1891] 1 Ch. p. 323.

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"the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court. § 504.

10. Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents,[1] and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same.[2] The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

* * * * *

[1] This merely means that the examination is to take place in the presence of the parties if they choose to attend. The examiner may on the application of one of the parties order witnesses in waiting out of the room: Re Western of Canada Oil Co., 1877, 6 Ch. D. 109.

[2] In strictness an examiner should himself take down the evidence, Stobart *v.* Todd, 1854, 23 L. J. Ch. 956, but it has become a common practice for the parties to agree that the evidence shall be taken by a shorthand writer in presence of the examiner; in which case the evidence will be received by the court: The "Knutsford," [1891] P. 219.

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§ 504. "16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed.

17. The person taking the examination of a witness under these Rules may, and if need be shall, make a special report to the court touching such examination and the conduct or absence of any witness or other person thereon, and the court or a judge may direct such proceedings and make such order as upon the report they or he may think just.[1]

18. Except where by this Order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter *without the consent* of the party against whom the same may be offered, *unless* the court or judge is satisfied that the deponent is *dead*, or *beyond the jurisdiction* of the court, or *unable from sickness* or other *infirmity* to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

* * * * *

20. Any . . . party or witness, having made an affidavit to be used or which shall be used on any proceeding in the cause or matter, shall be bound, on being served with such subpœna, to attend before such officer or person for cross-examination.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial, shall extend and be applicable to evidence taken in any cause or matter at any stage.

23. The practice of the court with respect to evidence at a

[1] See r. 5, ante. The examiner may order any witness to be examined apart from the others, even though he be the agent or solicitor of one of the parties: In re West of Canada Oil Lands and Works Co., 1877, 6 Ch. D. 109.

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"trial, when applied to evidence to be taken before an officer of the court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made *before issue joined* in any cause or matter shall, without special leave of the court or a judge, be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter."

§§ 505-6. It is incumbent on the judges to exercise extreme caution before making any order of an unusual character under either rule, unless, in the words of Cotton, L.J., "it is necessary for the purposes of justice that the ordinary way of taking evidence should be departed from."[1] An arbitration under the Companies Acts is a "cause or matter" falling within them;[2] but an arbitration by agreement, where no action has been brought, is not, and consequently, in such a case, neither the arbitrator nor the court has any power to order evidence to be taken on commission for the purposes of the arbitration.[3]

§§ 507-10. The "officers of the court" mentioned in Rule 5 are barristers of at least three years' standing,[4] appointed by the Lord Chancellor for five years, and removable by him.[5] They are called "Examiners of the Supreme Court." All the examinations ordered in the Chancery Division *must* be referred to them in rotation, unless the court or a judge otherwise directs,[6] and they *may* take the examinations in any cause or matter depending either in the King's Bench, or in the Probate, Divorce, and Admiralty Divisions, if the court or a judge so directs.[7] The

[1] Central News Co. *v.* East. News Tel. Co., 1844, 53 L. J. Q. B. 236 (C. A.); Berdan *v.* Greenwood, 20 Ch. D. 764, n. (Cotton, L.J.).
[2] In re Mysore, &c. Co., 1889, 42 Ch. D. 535.
[3] Re Shaw and Ronaldson, [1892] 1 Q. B. 91.
[4] R. S. C. made 4 Feb., 1884, Ord. XXXVII. r. 40.
[5] Id.
[6] Id. r. 39.
[7] Id.

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§§ 507-10 —512.

examinations, unless the court or a judge entrusts the inquiry to one particular examiner,[1] are distributed by the principal clerk to the registrars of the Chancery Division among the whole body, "according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession."[2] They are to give appointments in writing, specifying the place and time, not more than seven days in advance, "at which, subject to any application of the parties, the examination shall be taken;"[3] they are to regard the convenience of the witnesses, and all the circumstances of the case;[4] and, subject to such adjournment as they shall think reasonable or just, they are to proceed de die in diem;[5] they may, with like consent, examine persons not named in the order.[6]

§ 511. The Form[7] given by the R. S. C. 1883, for a commission to examine witnesses, contains a clause requiring the commissioners to be sworn. Decided cases[8] show that commissions may be granted to examine witnesses resident in countries beyond the dominion of the British Crown. A commission containing such a clause, but appointing a single commissioner, should also authorise him to administer the oath to himself.[9] There are certain countries the governments of which have notified to the British Foreign Office that they will not allow an oath to be administered within their dominions by any but their own officials. In such countries evidence is taken by means of Letters of Request, issued pursuant to Order XXXVII., r. 6.[10] The same considerations which move the court in ordering or refusing the issue of a commission apply to the issue of Letters of Request, seeing that they merely offer an alternative method of procuring the required evidence.

§ 512. To render the depositions taken under a commission

[1] Id. r. 49.
[2] Id. rr. 41, 42.
[3] Id. r. 44.
[4] Id. r. 45.
[5] Id.
[6] Id. r. 46.
[7] See F. 13, par. 8, App. J.
[8] Fischer *v.* Sztaray, 1858, 27 L. J. Q. B. 239; Duckett *v.* Williams, 1851. 1 C. & J. 510.
[9] Wilson *v.* De Coulon, 1883, 22 Ch. D. 841.
[10] For an enumeration of the countries in which it is necessary to take evidence by means of letters of request and for the practice regulating the issue and return of such letters, see the Annual Practice and the notes therein to Ord. XXXVII. r. 12, or see the text-book mentioned in the note to § 504, ante.

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available, the evidence must be such, in substance, as would be received according to the English law. If at the trial it appears, either on the face of the depositions, or by extrinsic proof, that the commissioners have, after due objection taken,[1] admitted illegal, or rejected legal, evidence, the judge will in his discretion suppress the depositions either wholly or in part.[2] The examiner's certificate must be taken. If it be not, its effect may not be stated to the court.[3]

§ 513. The commissioners must, moreover, have substantially followed the instructions given by the instrument appointing them. The court, however, will not look out critically for objections to their conduct, but will rather in their favour presume that they have discharged their duty.[4] Thus, though a commission that after the examinations had been taken, *the same* should be transmitted to this country, is not satisfied by sending mere copies of them;[5] where commissioners were directed to reduce the examinations into writing in the English language, and to swear an interpreter to translate the oath, interrogatories, and depositions, the commission was held to be well executed by the return of depositions, which had originally been taken down in the foreign language, and translated by the interpreter into English six weeks afterwards;[6] and when a commission contained a direction that the witnesses should be examined apart from each other, the court presumed that the commissioners had complied with this order, although their return was silent on the subject.[7] Possibly, however, the court would not feel justified in presuming that commissioners had taken the oath prescribed to them before acting.[8] When documents have been produced in evidence before the commissioners, and the

[1] Robinson *v.* Davies, 1879, 5 Q. B. D. 26.

[2] Lumley *v.* Gye, 1854, 23 L. J. Q. B. 112.

[3] Stuart *v.* Balkis Co., 1883, 53 L. J. Ch. 790.

[4] Atkins *v.* Palmer, 1821, 4 B. & Ad. 377; Greville *v.* Stulz, 1847, 17 L. J. Q. B. 14; Hitchins *v.* Hitchins, 1866, L. R. 1 P. & D. 153; Grill *v.* Gen. Iron Screw Collier Co., 1866, L. R. 1 C. P. 600; Hodges *v.* Cobb, 1867; L. R. 2 Q. B. 652; Simms *v.* Henderson, 1848, 11 Q. B. 1015; Richards *v.* Haugh, 1882, 51 L. J. Q. B. 361.

[5] Clay *v.* Stephenson, 1837, 3 A. & E. 807.

[6] Atkins *v.* Palmer, 1821, 4 B. & Ad. 377; R. *v.* Douglas, 1846, 16 L. J. Q. B. 417.

[7] Simms *v.* Henderson, 1848, 17 L. J. Q. B. 209.

[8] Brydges *v.* Branfill, 1841, 11 L. J. Ch. 12.

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§§ 513—515-16.

witness declines to part with the original, a copy or extract certified by the commissioners or examiner as being a true and correct copy or extract, is to be annexed to the witness's deposition. The witness must state in his deposition the reason why he refuses to part with the original.[1]

§ 514. When a commission to take evidence has been directed to a court, it is of course desirable that the court should have been rightly named; but a slight error in the description, provided it be not of such a nature as to render it really doubtful what tribunal was intended to have been addressed, will not invalidate a commission.[2]

§§ 515-6. With regard to reading at the trial depositions which have been taken under any of the various provisions mentioned above, reference must be made to the terms of Rule 18 of Order XXXVII., which has been already set out in full.[3] The effect of this rule is, that depositions taken under the above rules are in general admissible only in one or other of four events. First, if the opposite party *consents*; secondly, if the witness be proved to be *dead*; thirdly, if he be shown to be *beyond the jurisdiction* of the court;[4] and, lastly, if it appear that, from *sickness* or infirmity,—which terms do not necessarily mean an *incurable* malady, but will be satisfied by any grave illness,[5]—he cannot attend the trial. By Rule 5,[6] indeed, none of these conditions are absolutely binding, for the judge has power to order depositions to be given in evidence in any case. Still, that power must be guided by a judicial discretion,[7] and it will more readily be exercised in favour of a foreign defendant who desires to have his evidence taken on commission than in favour of a foreign

[1] See the Form No. 13 in Appendix J. to the R. S. C. 1883, being the writ of commission to examine witnesses on interrogatories and viva voce.

[2] Wilson *v.* Wilson, 1883, 5 P. D. 8.

[3] Supra, § 504.

[4] By Scotch law, the deposition of a witness *residing* abroad examined under a commission may be read without proving at the trial that he is then absent; the onus of showing that he is within the jurisdiction rests on the objecting party: Sutton *v.* Ainslie, 1852, 22 Ch. D. 511. The same doctrine was adopted by Sir C. Cresswell in the Matrimonial Court: Pollack *v.* Pollack, 1861. 30 L. J. P. & M. 183; and Mills *v.* Mills, 1861, 30 L. J. P. & M. 183.

[5] D. of Beaufort *v.* Crawshay, 1866, L. R. 1 C. P. 699.

[6] Cited ante, § 504.

[7] See Warner *v.* Mosses, 1880, 50 L. J. Ch. 288 (C. A.); Bidder *v.* Bridges, 1884, 37 Ch. D. 406.

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§§ 515-6, 517.

plaintiff.[1] The admissibility in evidence of depositions will still, in the absence of *consent*, depend (as it formerly did) upon whether the witness can or cannot attend the trial,[2] or rather upon whether the party desiring to use the depositions can or cannot show a reasonable cause why the witness should not attend the trial. Indeed, in the case of *affidavits*, it is expressly provided[3] that "where it appears to the court or judge that the other party bonâ fide desires the production of a witness for cross-examination, and *that such witness can be produced*, an order shall *not* be made authorising the evidence of such witness to be given by affidavit."[4]

§ 517. The question remains, how the incapacity of the witness to attend the trial is to be proved. The evidence as to such incapacity being exclusively addressed to the judge, *affidavits* are probably admissible upon the point as well as ordinary vivâ voce testimony.[5] The R. S. C. 1883, make no reference to the matter, while the other two forms which allude to it do so in language inconsistent and obscure. The Form of Order for a commission to examine witnesses contains a clause that the depositions may be given in evidence, "without any other proof of the *absence from this country* of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the said as to his belief of the ." This, so far as it goes, is clear, but it deals simply with the case of the witness being out of the jurisdiction of the court. The form given for an order for examining witnesses before an examiner, contains a direction that the depositions of any witness may be given in evidence on

[1] Emanuel *v.* Soltykoff, [1892] 8 T. L. R. 331.

[2] See Bagot *v.* Bagot, 1878, 1 L. R. Ir. 308; Berdan *v.* Greenwood, 1880, 20 Ch. D. 764, n.; Nadin *v.* Bassett, 1883, 25 Ch. D. 21.

[3] By R. S. C. Ord. XXXVII. r. 1.

[4] See Nadin *v.* Bassett, ubi supra.

[5] On one occasion Pollock, C.B., received the affidavit of a *medical man*, as sufficient proof of the sickness of a deponent to let in his deposition: Knight *v.* Campbell, 1848, Guildford Summer Assizes, MS. The point was again raised and left undecided in the case of the D. of Beaufort *v.* Crawshay, 1866, L. R. 1 C. P. 699. There, Willes, J., who seemed inclined to support the ruling of the Chief Baron, referred to R. *v.* Ryle, 1841, 9 M. & W. 227, but that case, on careful examination, will be found to throw a most treacherous light on the subject, as it relates to a mere ex parte proceeding. See, also, Carruthers *v.* Graham, 1841, 10 L. J. Q. B. 364; Robinson *v.* Marks, 1841, 2 M. & Rob. 375; Varicas *v.* French, 1849, 2 C. & K. 1008; Ward *v.* Wells, 1809, 1 Taunt. 461; and ante, §§ 473, 475.

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§§ 517—519.

the trial of the cause, "without any further proof of the *absence* of the said witness than the affidavit of the solicitor or agent of the as to his belief." The distinction probably is that when a witness has been examined abroad under an order for that purpose, less strict evidence of his continued residence abroad will be required, than in the case of a witness who at the time of the examination was in this country.

§ 518. All the provisions of the special Acts cited in a footnote on a previous page[1] relating to the examination of witnesses under commissions and orders have been extended to all suits and proceedings on the Revenue side of the King's Bench Division, and also made applicable to the Probate and Divorce Division in England,[2] and to the corresponding courts in Ireland.[3] The Rules of the Supreme Court as to the taking of evidence *abroad* have, however, no application to divorce and matrimonial causes, the practice being regulated by §§ 47 and 48 of the Matrimonial Causes Act, 1857,[4] and by Rules 132—137 of the Divorce and Matrimonial Rules, 1865, and Rule 198 of those of 1875.[5]

§ 519. The Court of Bankruptcy is empowered[6] to "order that any person, who in England would be liable to be brought before it," with the view of discovering the debtor's property, "shall be examined in Scotland or Ireland, or in any other place out of England";[7] and it is also provided[8] that "subject to general rules, the court may in any matter take the whole or any part of the evidence either vivâ voce, or by interrogatories, or upon affidavit, or by *commission abroad*." By General Rule 66, the court may empower any party to any matter, "where it shall appear necessary for the purposes of justice," to give

[1] See footnote to § 500, supra.

[2] See Rules in Div. and Mat. Causes, rr. 132—137, 198.

[3] See, also, on this subject, Brown *v.* Brown, 1869, L. R. 1 P. & D. 720; the Rules of March, 1874, for the Ct. of Prob. in Eng., rr. 116—123, and Form 31; and the Rules of 1865 for the Ct. of Div. and Mat. Causes, rr. 129—137, Form 20.

[4] 20 & 21 V. c. 85.

[5] R. S. C. Ord. LXVIII. r. 1.

[6] By 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 27, subsect. 5.

[7] The jurisdiction given by this provision must be read with some limitation, and does not extend to places abroad which are not within the jurisdiction of the British Crown: In re Drucker (No. 2), [1902] 2 K. B. 210 (Wright, J.).

[8] 46 & 47 V. c. 52, § 105, subsect. 5.

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depositions in evidence on such terms as the court may direct; and by r. 68, "an order for a commission to examine witnesses, and the writ of commission shall follow the forms for the time being in use in the High Court, with such variations as circumstances may require." §§ 519—523.

§ 520. The County Court rules on the subject of taking evidence by deposition will be found in Ord. XVIII. of the Rules of 1903, rr. 18—32, which are substantially identical with the provisions of R. S. C., Ord. XXXVII. rr. 5—25, which have been already set out.[1] It is also provided[2] that "affidavits and depositions shall be read as the evidence of the person *by whom they are used*."

§ 521. It has been already incidentally mentioned that evidence other than oral (in other words, secondary) is sometimes obtained by means of interrogatories, and the depositions in answer to them. Between the years 1854 and 1875 many rules were framed either by the Legislature or the judges, with the view of enabling litigants, before the actual trial took place, to scrape the consciences of their opponents by means of interrogatories.[3] The law on the subject is now embodied in R. S. C., 1883, Ord. XXXI.

§ 522. Any discussion as to *when* interrogatories may be administered or as to the practice with regard to them would appear to be out of place here. Moreover, full information on the subject will be found in any book upon "Practice." In this edition of the present work[4] it will therefore not be further discussed.

§ 523. The question whether any and what use can be made at the trial of the answers to interrogatories which have been given by the other side may properly be considered a branch of the Law of Evidence. As to this, the R. S. C., 1883, provide, by Ord. XXXI. r. 24, as follows:—"Any party may, at the trial

[1] Supra, § 504.

[2] C. C. Ord. XVIII. r. 17.

[3] 17 & 18 V. c. 125, §§ 51—57; 38 & 39 V. c. 77, Ord. XXXI. For corresponding provisions relative to Ireland, see 19 & 20 V. c. 102, §§ 56—59 and 62; 40 & 41 V. c. 77, Ir., and Rules. Similar powers were also extended to the old Court of Admiralty, whether for England (see 24 & 25 V. c. 10, § 17, repealed by 44 & 45 V. c. 59), or for Ireland; see 30 & 31 V. c. 114, § 41, Ir.

[4] The eighth edition (1885) of this work discussed the subject at great length.

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§§ 523—544. of an action or cause, matter, or issue, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories without putting in the others, or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

§§ 524—542. It has been remarked, "Under the new rules the plaintiff can read one passage without referring to the whole, even of the same paragraph, and I think no judge would allow a defendant, where he had made an admission, to read with it a passage which was not connected in sense or substance with that admission, even if he had put in a statement submitting that he was entitled to do so, and claiming to do so. Of course, when an admission is read everything ought to be read which is fairly connected with that admission, but I think it would be wrong for the defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted."[1]

§ 543. Before courts of law were empowered to issue commissions for themselves, it was often necessary to institute proceedings in Chancery as auxiliary to an action at law; and in such cases, recourse was had to what was called "an action for perpetuating testimony."

§ 544. To extend the benefits derivable from this mode of proceeding, two Acts were passed. The first of these was passed in 1842,[2] and is now repealed. Its provisions are, however, substantially embodied in the R. S. C., 1883, Ord. XXXVII. r. 35,[3] which provides, that "any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate[4] or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an

[1] Cotton, L.J., in Lyell *v.* Kennedy, 1884, 27 Ch. D. 1; and see Bowen, L.J.

[2] 5 & 6 V. c. 69, repealed by 46 & 47 V. c. 49.

[3] Proceedings under this rule should be jealously watched: Campbell *v.* E. of Dalhousie, 1869, L. R. 1 H. L. (Sc.) 462.

[4] See Re Stoer, 1884, 9 P. D. 120.

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action to perpetuate any testimony which may be material for establishing such right or claim." By the Legitimacy Declaration Act, 1858,[1] which is the second of the Acts just referred to (and is still in force), the Divorce Division of the High Court, on the petition of certain persons specially interested, may make decrees declaratory of the legitimacy or illegitimacy of any such petitioner, or of the validity or invalidity of the marriage of his parents, or grandparents, or of his own marriage, or of his right to be deemed a natural-born subject. An order for the examination of witnesses to perpetuate testimony is discretionary, and will not be made where the matter may be determined at once under the Legitimacy Declaration Act.[2]

§ 545. An action to perpetuate testimony must have "been commenced for the purpose," or no witness will be allowed to be examined.[3] The court may, on motion in such an action, if the defendant makes default in delivering a defence, make an order for the action to proceed in due course, and that (where this is advisable) a witness be at once examined, as if the pleadings were closed.[4] The witnesses will be examined orally before one of the examiners of the court under Ord. XXXVII. r. 5.[5] The depositions will then be taken down, signed, authenticated, and transmitted to the Central Office, as in other cases.[6] No relief being prayed, the action must not be set down for trial.[7] In general, the depositions will not be received at a subsequent trial as evidence,[8] except in support of an action, nor then unless it be proved that the witnesses are dead, or otherwise incapable of attending to be examined.[9] The practice of the ecclesiastical courts was similar.[10]

§ 546. If a witness, besides being examined on interrogatories, should testify at the subsequent trial of a cause, either party, on

[1] 21 & 22 V. c. 93, §§ 1, 2; extended to Ireland by 31 & 32 V. c. 20, Ir.

[2] Ord. XXXVII. r. 37.

[3] West *v.* Sackville, [1903] 2 Ch. 378.

[4] Marquess of Bute *v.* James, 1886, 33 Ch. D. 157; and see Ellice *v.* Roupell, 1863, 32 L. J. Ch. 563.

[5] Marquess of Bute *v.* James, supra. See, also, Litton *v.* Murphy, 1878, 1 L. R. Ir. 301, decided on the corresponding Irish order, Ord. XXXVI. r. 6.

[6] Ord. XXXVII. rr. 12, 16.

[7] Ord. XXXVII. r. 38.

[8] Where the Crown has an interest, if the Att.-Gen. be made defendant, then no objection can be taken to the depositions on the ground that the Crown was not a party to the action: Ord. XXXVII. r. 36.

[9] 1 Smith's Ch. Pr. 769; Morrison *v.* Arnold, 1817, 19 Ves. 670. See Att.-Gen. *v.* Ray, 1843, 2 Hare, 518.

[10] Wequelin *v.* Wequelin, 1839, 2 Curt. 263.

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§ **546.** any further trial respecting the same subject, may, if the witness be then incapable of attending, rely, at his option, either on the deposition, or on the previous vivâ voce testimony.[1] What such witness[2] orally testified may be proved, either by any person, who will swear from his own memory,[3] or by notes taken at the time by any person, who will swear to their accuracy,[4] or possibly from the necessity of the case, by the judge's notes.[5] This last mode of proof, however, is open to very grave, if not insuperable, objections, as such notes form no part of the record, nor is it the duty of the judge to take them, nor have they the sanction of his oath to their accuracy or completeness.[6] On the second reading of a divorce bill before the House of Lords, one of the witnesses who had testified in the court below having died, it was held that a certified copy of the judge's notes of his evidence was inadmissible until evidence was given by some one present at the trial that the extract from the judge's notes was a correct account of the evidence the deceased witness gave.[7] How far it may be necessary to prove the *precise words* spoken, does not clearly appear. It is said that in one case the evidence of a witness was rejected "as he could not undertake to give the words, but merely to swear to the effect of them."[8] The same precision has, on several occasions, been deemed requisite in America.[9] On the other hand, it has been forcibly urged[10] that to insist upon strict accuracy, in effect excludes this sort of evidence altogether, while extreme particularity and minuteness in a witness's narrative, and an undertaking by him to repeat with exactness every word of the deceased's testimony, ought to excite just doubts of the witness's honesty, and the truth of his evidence.[11]

[1] Tod *v.* E. of Winchelsea, 1828, 3 C. & P. 387; ante, § 400.

[2] Gr. Ev. § 166, in part.

[3] Strutt *v.* Bovingdon, 1803, 5 Esp. 56; May. of Doncaster *v.* Day, 1810, 3 Taunt. 262; R. *v.* Jolliffe, 1791, 4 T. R. 290.

[4] May. of Doncaster *v.* Day, 1810, 3 Taunt. 262.

[5] Id. (Sir J. Mansfield).

[6] Conradi *v.* Conradi, 1868, L. R. 1 P. & D. 514; Miles *v.* O'Hara, 1811, 4 Binn. 108 (Am.); Foster *v.* Shaw, 1821, 7 Serg. & R. 163 (Am.); Ex parte Learmouth, 1821, 6 Madd. 113.

[7] Griffin's Divorce Bill, [1896] A. C. 133.

[8] Mentioned by Lord Kenyon in R. *v.* Jolliffe, 1791, 4 T. R. 290.

[9] U. S. *v.* Wood, 1818, 3 Wash. 440 (Am.); Foster *v.* Shaw, 1821, 7 Serg. & R. 163 (Am.); Wilbur *v.* Selden, 1826, 6 Cowen, 162 (Am.); Com. *v.* Richards, 1836, 18 Pick. 434 (Am.).

[10] Gr. Ev. § 165.

[11] See Cornell *v.* Green, 1823, 10

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§ 547. It has been, on the one hand, decided that a dying deposition is not admissible unless the very words of the deceased were taken down, both question and answer having been taken down where questions were put.[1] On the other hand, on indictments for perjury, it is not necessary to state the entire examination, but it will suffice to narrate, with accuracy, the whole of that portion of the evidence which relates to the point on which the perjury is assigned, provided the witness can further swear that he heard the whole examination, and that nothing was subsequently said to qualify the original statement.[2] Unless he can do this, his evidence cannot be received;[3] and as the same rule ought to apply to the proof of the testimony of a deceased witness, it would follow that the person who heard a deceased witness give his evidence must at all events be able to positively state what was said on the examination in chief, and must also be able to give the substance of his answers in cross-examination, or to positively swear that nothing escaped the witness, which could vary or qualify the first statement.[4]

§ 548. When depositions are tendered in evidence as secondary proof of oral testimony, they are, of course, open to all the objections which might have been raised had the witness himself been personally present at the trial. Leading and other illegal questions are therefore constantly suppressed, together with the answers to them; and this, too, whether the testimony has been taken vivâ voce or by written interrogatories.[5] But a party cannot repudiate an answer which has been given to an illegal question put on his own side;[6] and in all cases where objections are taken to interrogatories on the ground of their being couched in a leading form, the judge is vested with a wide discretion as to how much, if any, of the depositions returned he will in consequence strike out.[7] Where a witness, on being examined upon interrogatories in a foreign country, stated in one of his answers the

Serg. & R. 14 (Am.); Miles *v.* O'Hara, 1811, 4 Binn. 108 (Am.); Caton *v.* Lenox, 1827, 5 Rand. 31. 36 (Am.); Jackson *v.* Bailey, (1806) 2 Johns. 17 (Am.).

[1] R. *v.* Mitchell, [1892] 17 Cox, C. C. 503.

[2] R. *v.* Rowley, 1825, 1 Moo. C. C. 111; R. *v.* Dowlin, 1792, Peake, R. 170.

[3] R. *v.* Jones, 1791, Peake, R. 38.

[4] Wolf *v.* Wyeth, 18-4, 11 Serg. & R. 149 (Am.).

[5] Hutchinson *v.* Bernard, 1836, 2 M. & Rob. 1.

[6] Id.

[7] Small *v.* Nairne, 1849, 13 Q. B. 840.

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§§ 548, 549.

contents of a letter which was not produced, *that part* of the deposition was suppressed at the trial, though it was urged, that as the witness was beyond the jurisdiction of the court, no means existed for compelling the production of the letter.[1] Said Chief Justice Tindal,[2] "We have no power to compel the witness to give any evidence at all; but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence." If, however, secondary evidence of documents be improperly given on commission (as by the production of copies without explanation as to the absence of the originals) and be accepted without objection made, it will be too late for the party against whom the evidence is given to subsequently take the objection which he might have urged at the time.[3]

§ 549. In another case, under similar circumstances, where a witness described the contents of a letter and of the reply to it, but produced neither, on this deposition being tendered the court at the trial rejected the answers which stated what the letters contained, but admitted so much of the deposition as stated that the witness had written a letter to the party in question; for had the witness been himself present in court he might have been examined thus far, in order to prove that the defendants through him had used some exertion to procure the party's answer.[4] Again, depositions have been admitted, though the witness on his examination had refreshed his memory with some papers which he alleged were partly in his handwriting and partly not, but which he refused to allow the commissioners to see upon the ground that they were private memoranda; for, as it was a matter for the discretion of the commissioners whether they would permit the witness to refer to papers during his examination, the learned judge, at the trial, presumed that they had exercised their discretion with propriety.[5]

[1] Steinkeller *v.* Newton, 1838, 9 C. & P. 319. In Wheeler *v.* Atkins, 1805, 5 Esp. 246, Ld. Ellenborough is reported to have held, under similar circumstances, that either the letter must be produced, or the *whole* interrogatory abandoned. But this case is clearly not law. See per Ld. Denman, in Small *v.* Nairne, 1849, 13 Q. B. 840.

[2] In Steinkeller *v.* Newton, 1838, 9 C. & P. 319.

[3] Robinson *v.* Davies, 1879, 5 Q. B. D. 26.

[4] Tufton *v.* Whitmore, 1840, 9 L. J. Q. B. 405.

[5] Steinkeller *v.* Newton, 1838, 2 M. & Rob. 372.

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§ 550. Having now discussed the rules governing the production of depositions as evidence, it remains to consider a third head of the subject of secondary evidence, viz., the general principle that the law recognises no *degrees* in the various kinds of secondary evidence.[1] This rule applies whether the original evidence be itself oral or documentary. For instance, if a deed be lost, or in the hands of the adversary, who after due notice refuses to produce it, secondary evidence of its contents may at once be given by parol testimony, even though the party offering such evidence may be proved to have in his possession a counterpart, a copy, or an abstract of the document;[2] and the former testimony of a deceased witness may be proved by any person who heard him examined, even where a clerk or a shorthand writer took down his evidence word for word.[3]

§ 551. At the same time, the rule that there are no degrees of secondary evidence simply applies to the *admissibility* of secondary evidence, and not to the degree of *weight* to which different sorts of secondary evidence are entitled; it does not mean that the mere memory of a witness, who has read a deed, is entitled to equal weight with an authenticated copy of the same instrument. In many cases a jury would properly regard evidence with distrust if it appeared that more satisfactory proof was intentionally withheld, and under some circumstances this distrust might even amount to absolute incredulity.

§ 552. Cases in which the law has expressly substituted some particular species of secondary evidence, in the place of primary proof, are, however, *excluded from the operation of the rule* that there are no degrees of secondary evidence. For instance, examined copies, and, in some cases, office or certified copies of public records and documents are, on grounds of general convenience, considered admissible,[4] and, though in strictness

[1] Doe *v.* Ross, 1840, 10 L. J. Ex. 201; Hall *v.* Ball, 1841, 10 L. J. C. P. 285; Brown *v.* Woodman, 1834, 6 C. & P. 206; Jeans *v.* Wheedon, 1843, 2 M. & Rob. 486.

[2] Cases in last note; also Sugden *v.* Ld. St. Leonards, 1876, L. R. 1 P. D. 154; Brown *v.* Brown, 1858, 27 L. J. Q. B. 173; In re Brown, 1858, 27 L. J. P. & M. 20; and In re Gardner, 1858, 27 L. J. P. & M. 55, in which cases oral evidence of the contents of a lost *will* was admitted. See Johnson *v.* Lyford, 1868, L. R. 1 P. & D. 546; also ante, § 436.

[3] Jeans *v.* Wheedon, 1843, 2 M. & Rob. 486. See R. *v.* Christopher, 1849, 2 C. & K. 994.

[4] Ante, § 439, and post, §§ 1534, 1545, 1598, et seq.

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§§ 552, 553.

secondary evidence, partake so much of the character of primary proof, that, so long as it is possible to produce them, other inferior degrees of secondary evidence cannot be received.[1] Parol testimony, in such cases, can only be admitted on proof, first, that the public record or document has itself been lost or destroyed (for otherwise a copy might be obtained), and, secondly, that any copy which may have been taken is no longer under the control of the party relying upon less satisfactory evidence.[2] In like manner, if a witness has been examined before a magistrate or coroner under such circumstances, that these officers respectively have, in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death, so long as the deposition itself can be produced, since the law, having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. The mere statement of a witness who was present at the examination will be admissible if—and only if—it can be shown that the deposition is lost or destroyed, or is in the possession of the opposite party, who after notice refuses to produce it.[3]

§ 553. The principle, too, which includes every species of secondary proof in one legal category, by no means, however, opens a door to any sort of evidence, however loose, which a party chooses to tender.[4] For example, the contents of a written instrument which is lost cannot be proved by means of a copy, until it be shown that such copy is accurate. If, as frequently happens, a party to the suit has himself made a copy of a letter which he has sent to his adversary, this copy, should the adversary, after notice to do so, refuse to produce the original letter, cannot be read in evidence, unless the party who made it can swear to its accuracy, or some other witness can be called who has compared it with the original.[5] Neither can a document,—excepting in a very few cases by statutory authority,—be

[1] Doe *v.* Ross, 1840, 10 L. J. Ex. 201.

[2] Thurston *v.* Slatford, 1700, 1 Salk. 284; Macdougal *v.* Young, 1826, Ry. & M. 392.

[3] See 2 Russ. C. & M. 895; R. *v.* Wylde, 1834, 6 C. & P. 380.

[4] Everingham *v.* Roundell, 1838, 2 M. & Rob. 138.

[5] Fisher *v.* Samuda, 1808, 1 Camp. 193. But see Waldy *v.* Gray, 1875, L. R. 20 Eq. 238.

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proved by the production of the copy of a copy.[1] Such evidence is rejected on the broad ground which renders hearsay evidence inadmissible, for assuming the second copy to correspond exactly with the first, the first must be produced and proved to have been compared with the original, or otherwise there would be nothing to show that the second copy and the original were identical. Such evidence would in fact be but the shadow of a shade.

§ 553A. We have now discussed in full the four great rules governing the production of testimony, which are: (i.) that the evidence must correspond with the issue—a rule which has necessitated as incidental to it the consideration of "variances" and of "amendments;"—(ii.) that the evidence must be confined to the point in issue; (iii.) that the burden of proof always lies upon the party who substantially asserts the affirmative—a rule as subsidiary to which the subjects of the "Right to Begin," and "Right to Reply" have been necessarily considered—; and (iv.) that the best evidence must always be produced—the subjects of "Secondary Evidence" being rendered admissible, (1) as to documents, by means of "Notices to Produce," &c., and (2) as to oral evidence by depositions, &c., having been treated of as arising out of, and in connection with, this fourth rule. The general rules governing the production of testimony having been thus explained fully, we may now usefully pass on to the next part of our subject, which will be to consider the particular kinds of evidence.

[1] Liebman *v.* Pooley, 1816, 1 Stark. R. 167; Everingham *v.* Roundell, 1838. 2 M. & Rob. 138.

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PART III.

PARTICULAR KINDS OF EVIDENCE.

CHAPTER I.

EVIDENCE ADDRESSED TO THE SENSES.

§ 554. § 554. The first degree of evidence, and that which, though open to error and misconception, is obviously most satisfactory to the mind, is afforded by our own senses.[1] "Believe half what you yourself see, and a twentieth part of what you hear from others," is a maxim, founded in the main upon the experience of life, marking the vast distinction that obtains between a knowledge of facts derived from actual perception, and the belief of the existence of facts resting on information. In judicial proceedings, the judge or jury can seldom act *entirely* upon evidence of this description.[2] In a vast number of instances, however, especially where the fact in dispute is sought to be proved by circumstantial evidence, the verdict will rest materially upon matter submitted to the ocular inspection of the jury.

[1] "Segnius irritant animos demissa per aurem,
Quam quæ sunt oculis subjecta fidelibus, et quæ
Ipse sibi tradit spectator."—Hor. *Ars Poet* l. 180.
So, also, in Shakespeare's "Rape of Lucrece," we read,—
"To see sad sights moves more than hear them told,
For then the eye interprets to the ear."

[2] Though, when pregnancy is pleaded, a jury of matrons is empowered to decide the issue upon examination of the person of the prisoner: Baynton's case, 1702, 14 How. St. Tr. 630; R. *v.* Wycherley, 1838, 8 C. & P. 262. But even here it appears, from the last of the cases just cited, that the matrons may, in addition to their personal inspection, hear the evidence of a surgeon; but in that event he must be examined as a witness in open court. See, also, Lady Essex's case, 1613, 2 How. St. Tr. 802.

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§§ 555, 555a.

§ 555. Indeed, in all cases in which the guilt or innocence of a prisoner depends upon the identity of two articles found in different places, it is highly expedient that a direct appeal be made to the senses of the jury, and that the actual articles to be compared should be produced in court. Thus, on an indictment for stealing corn, where the prisoner's possession of wheat, apparently resembling a quantity from which a portion has been recently taken, is relied upon by the prosecution, a comparison by the jury of the wheat found upon the prisoner with a sample of that belonging to the prosecutor will evidently be more satisfactory than for its identity to be sworn to by a witness who has examined the two lots out of court. It is true that the jury may come to an erroneous conclusion in such a case; for either the witnesses, who state that the two parcels of wheat produced were respectively taken from the prisoner and the prosecutor, may intentionally or accidentally assert what is not true, or the jurors themselves may be mistaken in assuming the identity or non-identity of the grain. Still, in the event of a witness being called to state the result of his previous examination of the two samples, these sources of error will both equally exist, while, in the latter case, there is also the further possibility that the witness may tell a fabricated story with little danger, since examination as to mere matters of opinion is almost necessarily inconclusive. Similar considerations arise where it is necessary to compare two articles found in different places; as, for example, the wadding of a pistol with portions of a torn letter found on the person of the accused; the fractured bone of a sheep with mutton found in his house; or fragments of dress with his rent garment; or to compare damaged property with the instrument by which the damage is supposed to have been effected.

§ 555A. However, the rule which demands the production of the best evidence does not expressly require that the course suggested should always be adopted, but permits a witness to testify as to his having made the comparison, without first proving that the articles cannot be produced at the trial. Nevertheless the non-production of articles which could be produced, when unexplained, often generates a suspicion of unfairness, and will always furnish an occasion for serious

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§§ 555a, 556.

comment.[1] A well-known instance of the application of this principle occurred where a boy, having found a diamond, took it to a jeweller, who refused to return it to him, or to produce it at the trial, on which the jury were directed to presume that this diamond was one of the finest water.[2] Another instance of the principle was furnished by a case[3] in which, the point at issue being whether "Running Rein," a Derby-winner of 1844, had been foaled by "Mab" in 1841, the plaintiff, being unable to comply with an order of the court to produce "Running Rein," submitted to a nonsuit rather than run the almost inevitable risk of a verdict in favour of the defendant.

§ 556. In such cases as these, however, where the personal examination of the articles by the judge or jury is very valuable, they ought, in certain instances, to be assisted by persons conversant with the particular articles produced. For instance, on a question whether two samples of wine be drawn from the same bin, or two pieces of cloth be the produce of the same loom, or two coins be struck in the same die, a wine merchant, a clothier, or an officer of the Mint,[4] should respectively be called; and where a question arose whether the general get-up of a defendant's omnibus was a colourable imitation of the plaintiff's omnibus, so as to be calculated to deceive, the court held that some independent evidence must be given, and that the judge who tried the case was not entitled to decide the question by merely viewing the rival omnibuses, for a view is for the purpose of enabling the tribunal to understand the questions that are being raised, and to follow and apply the evidence.[5] Such evidence, however, does not dispense with the necessity of

[1] See ante, § 117.

[2] Armory *v.* Delamirie, 1721, 1 Str. 505.

[3] Wood *v.* Peel, 1844, Ex. Middx. Sittings after T. T., 1844, cor. Alderson, B., MS.

[4] By 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 29, in order to prove coin to be counterfeit, it is not necessary to call any moneyer or other officer of the Mint, but it is sufficient to prove that fact by the evidence of any other credible witness.

[5] London General Omnibus Co. *v.* Lavell, [1901] 1 Ch. 135. Some doubt has been expressed as to the correctness of this decision, and it appears, at all events, not to apply in passing off actions, for where in such an action the question arises whether two trade marks or trade names are so alike as to be calculated to deceive the judge may, and in many cases must, decide the case on the evidence of his own senses alone. See Bourne *v.* Swan & Edgar, [1902, 1903] 1 Ch. 211 (Farwell, J.), and post, § 1419, and cases there cited.

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producing the articles whenever possible, so that the tribunal may test the accuracy of the opinions expressed by the witnesses, and may perceive that the reasons, upon which those opinions are founded, correspond with the actual state and condition of the articles themselves. These observations are especially applicable in comparisons of disputed handwriting—the mere fact that an expert *says* that two specimens of handwriting are similar or dissimilar is of little value, but becomes of great weight if he can point out to the tribunal peculiar features of similarity or dissimilarity in them. §§ 556, 557.

§ 557. Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions, or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirist.[1]

[1] For instance, Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, "was by a beggar woman stolen away," "became a bricklayer when he came to age," and was his father, one of the rioters confirms the story, by saying, "Sir, he made a chimney in my father's house, and the *bricks* are alive at this day to testify it: therefore, deny it not." — Second Part of Hen. 6, act 4, scene 2. Whately makes use of the above anecdote in his diverting "Historic Doubts relative to Napoleon Buonaparte," p. 28th, 6th edit., and adds, "Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold." So, in the interesting story of "The Amber Witch" (Amber Witch," translated by Lady Duff Gordon, pp. 78—80), the poor girl charged with witchcraft,—after complaining that she was the victim of the sheriff, who wished to do "wantonness with her," added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the sheriff replied, "that it was his little lapdog, called Below, which had scratched him, while he played with it that very morning," and having

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§§ 558—560.

§ 558. In causes relating to disputed rights of way, light, or water, or otherwise, involving some question which depends on the relative position of places, it is often desirable that the jury should have an opportunity of *viewing the spot* in controversy;[1] since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps or plans, which are often inaccurate and obscure, and may perhaps have been prepared with an express view to mislead. A clause providing machinery to direct a view of the place in question, "where proper, after writ issued by order of the court or a judge," is contained in the Jury Act of 1825.[2]

§ 559. The Act just cited extends to criminal cases depending in the superior court.[3] In civil actions it, however, extended only to such as those for trespass, quare clausum fregit, ejectment, or waste.[4] The cumbrous machinery it provided having been first improved,[5] the narrow construction placed upon this Act led[6] to i being practically superseded, so far as regards civil causes, by § 58 of the C. L. P. Act, 1854.[7]

§ 560. The last-named is itself now repealed,[8] and the law on the subject, so far as concerns civil cases, is governed by the R. S. C., 1883, Ord. L. Rule 3 of this Order, in general terms, gives the court or a judge power, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the *detention*, *preservation*, or *inspection of any property or thing*, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorise *any persons* to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary

produced the dog, the court were satisfied with the truth of his explanation.

[1] For an early instance of this being ordered, see Mossam *v.* Ivy, 1684, 10 How. St. Tr. 562, 631.

[2] 6 G. 4, c. 50, §§ 23, 24 ("The Juries Act, 1825").

[3] See id.

[4] See Stones *v.* Menhem, 1848, 17 L. J. Ex. 215.

[5] By 15 & 16 V. c. 76, § 114.

[6] On the recommendation of the C. L. Commissioners contained in their 2nd Report, at p. 37.

[7] 17 & 18 V. c. 125.

[8] By 46 & 47 V. c. 49.

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§§ 560—563-5.

or expedient for the purpose of obtaining full information or evidence. Rule 4 of the same Order gives power to any *judge*, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to *inspect* any property or thing concerning which any question may arise therein. Rule 5 extends the provisions of Rule 3 to *inspection by a jury*, and gives the court or a judge power in such a case to make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place, and in such manner as they or he may think fit. Finally, Rule 6 provides that an application for an order under Rule 3 may be made to the court or a judge by any party. "If the application be by the plaintiff, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

§ 561. Very similar (though not identical) provisions are in force in Ireland.[1]

§ 562. Powers of directing a view are also possessed by the court in which such actions are pending, in actions under the Patents, Designs, and Trade Marks Act, 1883;[2] by the Admiralty Court;[3] and a *Referee* and his assessors (if any) to whom an action pending in the High Court, or any cause or matter, or any question in any cause or matter, has been referred, also possess powers of ordering an inspection or a view.[4]

§§ 563-5. All these powers to order views of places or inspection of property, whether granted by statute or rule, give to the courts and judges, by implication, authority to order all things ancillary to the view or inspection required. Where, therefore, a wall had recently been erected in a mine, so as to obstruct a complete inspection of the workings, the court, on a question of encroachment, ordered the removal of such obstruction.[5]

[1] See 16 & 17 V. c. 113.
[2] 46 & 47 V. c. 57, § 30.
[3] Under 24 & 25 V. c. 10 ("The Admiralty Court Act, 1861"), § 18. See 30 & 31 V. c. 114, § 66, Ir. See, also, The Germania, 1868, 37 L. J. Adm. 59.
[4] Ord. XXXVI. r. 48.
[5] Bennett *v.* Griffiths, 1861, 30 L. J. Q. B. 98.

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§ 566. § 566. County Courts,[1] Barmote Courts[2] and Courts-martial,[3] also possess power of ordering a view or an inspection. But with these important exceptions the power of ordering a view appears to exist only in, and so far as regards the R. S. C. of 1883[4] are expressly confined to, the High Court and its judges. It is suggested that the most extensive power of directing a view ought to be extended to every court of record and also to all criminal proceedings, the practice in which respecting views still rests on the inadequate provisions of the Acts of 1825 and 1852.[5] In short, the presiding judge at *any* trial ought to be expressly empowered to order a view, even *after the evidence may have been heard*,[6] if in his opinion such a step is necessary for the purposes of justice.

[1] Cy. Ct. Rules, 1903, Ord. XXII. r. 17.

[2] See 14 & 15 V. c. 94, 1 Sch., §§ 22—28, and 2 Sch. Form.

[3] 44 & 45 V. c. 58 ("The Army Act, 1881"), § 53, sub-s. 7.

[4] R. S. C., 1883, Ord. LXVIII. r. 1.

[5] 6 G. 4, c. 50, §§ 23 and 24 ("The Juries Act, 1825"); 15 & 16 V. c. 76, § 114, both cited ante, § 558. As to the existing practice in criminal cases which have been removed into the Queen's Bench Division of the High Court, see Short & Mellor's Crown Office Practice, pp. 215 et seq. An order for a view is drawn up as of course. See Crown Office Rules, r. 252.

[6] In R. *v.* Martin, 1872, L. R. 1 C. C. R. 378, the Court of Crim. Appeal held that the deputy assistant judge for the Middlesex Sessions, on the trial of a misdemeanour, was empowered to allow the jury to have a view of the premises in question, after he had summed up the evidence to them. Here, however, no argument was heard, and the attention of the judges was not directed to any of the statutes on the subject.

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CHAPTER II.

HEARSAY.

§ 567. § 567.[1] As evidence afforded by our own senses is seldom attainable in judicial trials, the law is satisfied with requiring the next best evidence, namely, the testimony of those who can speak from their own personal knowledge. It is not, indeed, requisite that the witness should have personal knowledge of the main fact in controversy; for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is in general necessary that a witness should only be permitted to speak to such facts only as are within his own knowledge, whether they be things said or done, and that he should not testify from information given by others, however worthy of credit they may be. It is, too, indispensable to the proper administration of justice,—first, that every witness should give his testimony under the sanction of an oath, or its equivalent, a solemn affirmation,—and secondly, that he should be subject to the ordeal of a cross-examination by the party against whom he is called, so that it may appear, if necessary, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. And testimony from the relation of third persons cannot, even where the informant is known, be subjected to either of these tests. It has been well observed that, "If the first speech were without oath, another oath that there was such speech makes it no more than a mere speaking, and so of no value in a court of justice."[2] Besides, it is often impossible to ascertain through whom, or how many persons, the original narrative has been transmitted. Evidence of this sort constitutes that sort of second-hand evidence which is termed

[1] Gr. Ev. § 98, in great part.

[2] B. N. P. 294 *b*.

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hearsay; a species of proof which, with a few exceptions that will be presently noticed, cannot be received in judicial investigations.[1]

§ 568. The rule excluding such evidence has been recognised in England as a fundamental principle ever since the time of Charles the Second.[2] It even applies in cases where no other evidence can possibly be obtained. For example, a statement not on oath, even by a dead man who was the only eye-witness of a transaction, is inadmissible;[3] and on indictments for ravishing children, too young to be admissible witnesses, statements made by the children to their mothers shortly after the offence was committed cannot be received in evidence.[4] Where a servant was indicted for perjury, in saying that her deceased mistress had never had a child, declarations of the mistress were rejected as evidence for the Crown.[5] Moreover, a declaration, though made

[1] The rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Dickens:

"'I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up if you please, Mr. Weller.'

"'I mean to speak up, sir,' replied Sam. 'I am in the service o' that 'ere gen'l'man, an wery good service it is.'

"'Little to do, and plenty to get, I suppose?' said Serjeant Buzfuz, with jocularity.

"'Oh, quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes,' replied Sam.

"'You *must not tell us what the soldier*, or any other man, *said*, sir, interposed the judge, '*it's not evidence.*'

"'Wery good, my lord,' replied Sam." See the account of Bardell *v.* Pickwick in the Pickwick Papers, at p. 367.

[2] One of the earliest cases in which the rule was acted upon is Sampson *v.* Yardley, 1667, 2 Keb. 223, pl. 74, 19 Car. 2.

[3] 1 Ph. Ev. 209. In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent witness: 1 Dickson, Ev. Sc. 66, 67; Dysart Peer. 1881, 6 App. Cas. 489. (H. L.), where the extent of, and exceptions to the rule are discussed at some length. It seems that even where the relation has been handed down to the witness at second hand, and through several successive relators, each only stating what he received from the intermediate relator, it will still be admissible, if the original and intermediate relators are all dead, and would have been competent witnesses if living: Tait, Ev. 430, 431; but see 1 Dickson, Ev. 70. The reason for receiving hearsay evidence in cases where, as is often the case in Scotland, the judges determine upon the facts in dispute, as well as upon the law, is stated and vindicated by Sir J. Mansfield, in the Berkeley Peer., 1811, 4 Camp. 415. Even in English courts, hearsay evidence is often admitted and acted upon in affidavits, which are submitted to the judges only.

[4] R. *v.* Brasier, 1779, 1 Leach, 199; R. *v.* Nicholas, 1846, 2 C. & K. 246. The fact that the witness made a complaint is admissible. See post, § 580. And the late Willes, J., used to admit the further question whether, in making the complaint, any name was mentioned, but this appears incorrect. See R. *v.* Wink, 1834, 6 C. & P. 397, post, note to § 581.

[5] Heath's case, 1744, 18 How. St.

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on oath, and in the course of a judicial proceeding, cannot be received, if the *litigating parties are not the same;* because, in such case, the party against whom the evidence is offered, has had no opportunity of cross-examining the declarant.[1]

§ 569. The rule excluding hearsay evidence will even shut out proof of *declarations in disparagement of his own signature made by a deceased subscribing witness* to a deed or will.[2]

§ 570.[3] The term *hearsay* is used in law with reference to what is *done* or *written*, as well as to what is spoken. In its legal sense "hearsay" evidence is all evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.[4] Such evidence is rejected not only because it is not given upon oath, because it cannot be tested by cross-examination, and because it supposes some better testimony, which might be adduced in the particular case, but also because of its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness,[5] its incompetency to satisfy the mind as to the existence of the fact, and because of the frauds which might be practised with impunity under its cover.[6]

§ 571. Nevertheless, the rule excluding hearsay evidence (though in general admirably calculated for trials before popular tribunals) may in particular instances work considerable injustice. For example, on a question respecting the competency of a testator, the conduct of his family or relations in taking the

Tr. 68. In an action of ejectment, where the same question was in issue, and the words charged as perjury were uttered, such evidence was admitted, as relating to a matter of pedigree: see Annesley *v.* D. of Anglesea, 1743, 17 How. St. Tr. 1430 (Ir.).

[1] R. *v.* Nuneham Courtney, 1801, 1 East, 373; R. *v.* Ferry Frystone, 1801, 2 East, 54; R. *v.* Abergwilly, 1801, 2 East, 63; Mima Queen *v.* Hepburn, 1813, 7 Cranch, 296 (Am.).

[2] See Stobart *v.* Dryden, 1836, 5 L. J. Ex. 218, where the matter was much discussed; and it was pointed out by the court that the party adversely affected had not had any opportunity of cross-examination.

[3] Gr. Ev. § 99, in great part.

[4] 1 Ph. Ev. 185.

[5] "Pluris est oculatus testis unus, quam auriti decem;
Qui audiunt, audita dicunt, qui vident, planè sciunt."
PLAUT. *Trucu.* Act 2, sc. 6, l. 8, 9.

[6] Per Marshall, C.J., in Mima Queen *v.* Hepburn, 1813, 7 Cranch, 290, 295, 296 (Am.); Davis *v.* Wood, 1816, 1 Wheat. 6, 8 (Am.) R. *v.* Eriswell, 1790, 3 T. R. 721.

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same precautions in his absence as if he were a lunatic, or his election in his absence to some high and responsible office, or the conduct of a physician who permitted him to execute a will, are facts which, though affording cogent *moral* evidence, are inadmissible as evidence in a court of law, because when considered with reference to the matter in issue, they appear to be mere statements expressed in the language of conduct instead of the language of words, and consequently, in fact, only "hearsay."[1] Again, on a question of seaworthiness, the fact that a deceased captain, after examining every part of the vessel, embarked in it with his family, is (for similar reasons) not legal evidence on a question as to the vessel's seaworthiness;[2] neither, in an action to recover for the loss of insured property, is the fact that other underwriters have paid on the same policy,[3] nor, on a question of when an act of bankruptcy was committed, and the title to goods arose, is evidence that after the issuing of a fiat, certain creditors of the bankrupt returned to his assignees goods which they had received from the bankrupt previously to the date when he delivered other goods to the defendant.[3]

§ 572. In the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere *declarations* of parties not examined on oath, nor subjected to cross-examination; for these declarations were accompanied *by acts done* in confirmation of their sincerity, and, as such, the evidence was, morally speaking, entitled to great weight. They were the more entitled to consideration, because if an act done be relevant to the issue, and therefore evidence per se, any declarations accompanying that act are—as we shall presently see[4]—admissible for the purpose of illustrating, qualifying, or completing it. Where, however (as in these instances), the act is in its own nature irrelevant to the issue, if the declaration be per se inadmissible, the union of the two cannot render them evidence.[5]

[1] Wright *v.* Doe *d.* Tatham, 1837, 7 A. & E. at 388, per Parke, B.; 4 Bing. N. C. at p. 547, per Vaughan, J.

[2] 7 A. & E. 387, 388.

[3] Backhouse *v.* Jones, 1839, 6 Bing. N. C. 65. See, also, Gresham Hotel Co. *v.* Manning, 1867, Ir. R. 1 C. L. 125.

[4] Post, §§ 583 et seq.

[5] 7 A. & E. 361; 4 Bing. N. C. 49 See Gresham Hotel Co. *v.* Manning, 1867, Ir. R. 1 C. L. 125.

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§ 573. This question was much discussed in a case[1] which was tried four times, where the title to property depended upon the competency of a testator to make a will. The House of Lords (agreeing with the opinion of the majority of the judges, who were divided as mentioned post, in note [3] at end of this section) finally decided, that letters addressed to a person, whose sanity is the fact in question, are inadmissible to show that he was sane, though the writers were since dead, and the party was addressed as an intelligent man, unless such letters can be connected by evidence with some act done by such deceased in relation thereto. A great majority of the learned judges also thought that the mere fact of finding such letters, many years after they were written, with the seals broken, in company with other papers which bore indorsements in the testator's handwriting, in a cupboard under his bookcase in his private room, was insufficient to raise an inference that they had been read, understood, or acted upon by him, because although letters, found in such a situation, would undoubtedly be evidence against a party criminally accused or civilly charged—since it is a primâ facie presumption of law hat every man is of sound mind, and it would therefore be assumed that the deceased had appreciated the letters[2]—yet that to act upon this presumption in a case where the capacity of the party is the very matter in controversy, would be to argue in a circle. It would, in fact, be to argue thus :—because the testator had sufficient ability to transact business, the inference arises that he read and understood the letters; and because he read and understood the letters, therefore the inference arises that he had sufficient ability to transact business.[3]

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[1] Wright *v.* Doe *d.* Tatham, 1834—1837, 2 Russ. & Myl. 1; 1 A. & E. 3; 3 N. & M. 260; 7 A. & E. 313; 6 N. & M. 132; 4 Bing. N. C. 489.

[2] See 7 A. & E. 369 (Gurney, B.); id. 376 (Bosanquet, J.); 4 Bing. N. C. 531 (Alderson, B.).

[3] See 7 A. & E. 391 (Parke, B.); 4 Bing. N. C. 545 (id.); id. 531 (Alderson, B.); id. 502, 504 (Coleridge, J.); id. 525, 526 (Patteson, J.). The letters rejected in this case were three. 1st. A letter of gratitude to the testator from a clergyman to whom he had formerly given preferment; 2nd. A letter of friendship from a relative, with whom the testator was proved to have corresponded three years afterwards; 3rd. A letter advising the testator to direct his attorney to take steps in a transaction with a certain parish. This letter was indorsed by the attorney, who was long since deceased. Three of the judges considered that all the letters were admissible, six thought that the last was. The remaining judges, including Lords Brougham, Lyndhurst, and Cottenham, held that all the letters were alike inadmissible.

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§ 574. If, indeed the testator, in the case just mentioned, had himself indorsed these letters, or if any direct and positive evidence had been given to show that he had, whether by act, speech, or writing, manifested a knowledge of their contents, the letters could not have been rejected, or in any way withdrawn from the consideration of the jury; for although they would then have been admitted solely on the technical ground that they explained and illustrated his conduct, no rule of law could have prevented them from operating with full effect upon the minds of the jury, as showing the unbiassed opinions of the writers, and in what manner the testator had been treated by them.[1]

§ 575. The Probate Division is now bound by statute to recognise the rules of evidence observed in the other Divisions of the High Court,[2] and would therefore appear to be bound to follow the decision in the case just mentioned.[3]

§ 576.[4] It does not follow that, because the writings or words in question are those of a third person not under oath, they are therefore to be considered as "*hearsay.*" On the contrary, it often happens that the very fact in controversy is, whether certain things were written, or spoken, and *not* whether they were *true;* and at other times the oral or written statements tendered in evidence may be the natural or inseparable concomitants of the principal fact in controversy.[5] In either of these cases it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue. Thus, if the question be

[1] 7 A. & E. 325 (Ld. Denman); 4 Bing. N. C. 500 (Coleridge, J.); id. 530 (Alderson, B.); id. 510 (Williams, J.); id. 567 (Tindal, C.J.).

[2] "The Supr. Ct. of Jud. Act, 1873" (36 & 37 V. c. 66), § 16; "The Supr. Ct. of Jud. Act, 1875" (38 & 39 V. c. 77), § 18.

[3] When the ecclesiastical tribunals were courts of probate, they adopted a different rule from that established by the case of Doe *d.* Tatham *v.* Wright; and in questions respecting the mental capacity of a testator, they admitted, as evidence of *treatment*, letters written to him by his friends, without proof of any recognition on his part (Morgan *v.* Boys, 1836, cited 7 A. & E. 337 (Sir H. Jenner); Handley *v.* Jones, 1836, cited 7 A. & E. 337; Waters *v.* Howlett, 1831, cited 1 A. & E. 8 (Sir J. Nicholl)) — and, as evidence of *opinion*, letters written by his relatives even to other parties: Wheeler *v.* Alderson, 1831, 3 Hagg. Ecc. 587 (Sir J. Nicholl).

[4] Gr. Ev. § 100, in great part.

[5] Bartlett *v.* Delpratt, 1808, 4 Mass. 702 (Am.); Du Bost *v.* Beresford, 1810, 2 Camp. 512.

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whether a party has acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. Illustrations of this[1] often occur in actions for malicious prosecution,[2] or libel;[3] and in cases of agency, and of trusts. Thus in an action for malicious prosecution, a plaintiff—to show that the magistrate's leniency in admitting him to bail was occasioned, not by the intercession of the defendant, but by a letter said to have come from a great personage—may give such letter in evidence, without proof that it was written by that personage's authority.[4] A defendant in such a case may state that he acted on the advice of a magistrate in what he did.[5] An affidavit by a clerk of prosecutor's solicitor, used on an application for bail stating that means had been taken on the part of the prosecutor to prevent a person from becoming bail for the plaintiff, is likewise admissible in such an action as original evidence, without the clerk's being called to prove by whose instructions he had made it.[6] And the *replies* given to inquiries made at the residence, either of an absent witness, or of a bankrupt, denying that he was at home, are original evidence, without examining the persons to whom they were addressed, inasmuch as to establish the denial (which is the only material fact) the testimony of the parties inquiring is sufficient.[7]

§ 577.[8] This doctrine not only applies whenever the fact that a certain communication was made, and not its truth or falsehood, is the point in controversy;[9] but it also extends to those cases, where the *truth* of the fact in dispute will be inferred from the *existence* of another fact which is under investigation. Thus the *existence* of *general reputation, reputed ownership, public rumour,*

[1] Gr. Ev. § 101, in part.
[2] Ravenga *v.* Mackintosh, 1824, 2 B. & C. 693.
[3] Coleman *v.* Southwick, 1812, 9 Johns. 45 (Am.).
[4] Taylor *v.* Willans, 1831, 2 B. & Ad. 845.
[5] Monaghan *v.* Cox, 1892, 31 Am. St. R. 555 (Am.).
[6] Taylor *v.* Willans, 1831, 2 B. & Ad. 845.
[7] Crosby *v.* Percy, 1808, 1 Taunt. 364; Key *v.* Shaw, 1832, 8 Bing. 320; Morgan *v.* Morgan, 1832, 2 L. J. C. P. 27; Sumner *v.* Williams, 1809, 5 Mass. 444 (Am.); Pelletreau *v.* Jackson, 1833, 11 Wend. 110, 123, 124 (Am.); Phelps *v.* Foot, 1815, 1 Conn. 387 (Am.). Where it is necessary to show, not only that diligent search has been made for a witness, but that he is actually absent, such evidence is not admissible. See ante, §§ 475, 517.
[8] Gr. Ev. § 101, in part.
[9] Whitehead *v.* Scott, 1830, 1 M. & Rob. 2; Shott *v.* Strealfield, 1830, 1 M. & Rob. 8.

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§§ 577—579. *general character, general notoriety*, and the like, is primâ facie evidence of its *truth*. In other words, the fact that the rumour which is in fact composed of the speech of third persons not under oath exists, is original evidence and not hearsay; rumour showing the concurrence of many voices as to the immediate subject of inquiry raises a presumption that the fact in which they concur is true.[1]

§ 578. For example, *general reputation* is usually admissible to establish the fact of parties being married.[2] In many of the reported cases on this subject the marriage has been proved by evidence of certain specific facts, such as the parties being received into society as man and wife, being visited by respectable families in the neighbourhood, attending church and public places together, and otherwise demeaning themselves in public, and addressing each other, as persons actually married.[3] But mere general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute,[4] will be receivable in proof of marriage. Indeed, the uncorroborated statement of a single witness, who did not appear to be related to the parties, or to live near them, or to know them intimately, but who asserted that he had *heard* they were married, has been after verdict held sufficient primâ facie to warrant the jury in finding marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof.[5] And a fact, as *e.g.*, a marriage, may be even established by reputation, though one of the parties to it denies it.[6]

§ 579. Upon somewhat similar grounds, on a prosecution for

[1] Foulkes *v.* Sellway, 1800, 3 Esp. 236; Jones *v.* Perry, 1796, 2 Esp. 482; Oliver *v.* Bartlett, 1819, 1 B. & B. 269; Gurr *v.* Rutton, 1816, Holt, N. P. 327.

[2] Except in petitions for damages for adultery and prosecutions for bigamy, where, as we have seen (ante, § 172), strict proof is required.

[3] Kay *v.* Duchesse de Vienne, 1811, 3 Camp. 123; Hervey *v.* Hervey, 1773, 2 W. Bl. 877; Birt *v.* Barlow, 1779, 1 Doug. 174; Read *v.* Passer, 1794, 1 Esp. 214; Leader *v.* Barry, 1795, 1 Esp. 353; Doe *v.* Fleming, 1827, 4 Bing. 266; Goodman *v.* Goodman, 1858, 28 L. J. Ch. 745; Smith *v.* Smith, 1811, 1 Phillim. R. 294; Hammick *v.* Bronson, 1812, 5 Day, 290, 293 (Am.); In re Taylor, 1842, 9 Paige, 6 (Am.). These might possibly be put upon the ground that they amount to *admissions* by the parties themselves.

[4] Lyle *v.* Ellwood, 1874, L. R. 19 Eq. 98; Collins *v.* Bishop, 1878, 48 L. J. Ch. 31.

[5] Evans *v.* Morgan, 1832, 2 C. & J. 453.

[6] Elliott *v.* Totnes Union, 1893, 57 J. P. 151.

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conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness may be called to prove that several persons not examined at the trial had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance;[1] and on a question whether a libellous painting represents a certain individual, the declarations of spectators while looking at the picture in the exhibition are admissible.[2]

§ 580.[3] Whenever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And the question whether they were real, or feigned, is for the jury to determine. Thus, the representations by a *sick person* of the nature and effects of the *malady* under which he is labouring are receivable as original evidence, whether they be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statements.[4]

§ 581. Accordingly, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before

[1] R. *v.* Vincent, 1840, 9 C. & P. 275; Redford *v.* Birley, 1822, 3 Stark. 88.

[2] Du Bost *v.* Beresford, 1810, 2 Camp. 512.

[3] Gr. Ev. § 102, in part.

[4] Aveson *v.* Ld. Kinnaird, 1805, 6 East, 188; R. *v.* Blandy, 1752, 18 How. St. Tr. 1135—1138; Grey *v.* Young, 1823, 4 M'C. 31 (Am.); Gilchrist *v.* Bale, 1839, 8 Watts, 355 (Am.). To such an extent has this doctrine been carried that where, in an action by a husband upon a policy of insurance on the life of his wife, the question was as to the state of the wife's health at the time when the policy was effected, a witness for the defendants was allowed to state the result of a conversation with the deceased, which took place shortly after the surgeon who was consulted in effecting the insurance had given a certificate of her health, in the course of which the deceased had expressed an apprehension that she should only live a few days, and had added that she had not been well from a time preceding her being examined by the surgeon. The conversation being held admissible, although at that time it was a general rule that the declaration of a wife against her husband must be excluded (see, now, 16 & 17 V. c. 83), as the surgeon had been first called by the plaintiff, and had admitted that he had formed his opinion respecting her health principally from the satisfactory answers which she then gave to his inquiries: Aveson *v.* Ld. Kinnaird, 1805, 6 East, 188.

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§ 581. he took the poison, have been received in evidence for the purpose of proving the state of his health at that time.[1] In actions or indictments for assault, what a man has said about himself to his surgeon is evidence to show what he suffered by reason of the assault;[2] on an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed, will perhaps be admissible.[3] In prosecutions for rape and offences of a similar character, a statement in the nature of a complaint made by the prosecutrix to a third person not in the presence of the accused may be given in evidence, provided such statement is shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence.[4] It was formerly doubted whether the *particulars* of the complaint could be disclosed by the witnesses for the Crown, either as original, or as confirmatory evidence;[5] it is now, however, settled that such particulars may be given in evidence by the witnesses for the prosecution in the class of cases with which we are dealing, but only in such cases, not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part.[6] The mere fact that the statement has been made in answer to a question will not in itself render it inadmissible, unless the question is of a leading and inducing or intimidating character; and it is for the judge in each case to determine whether the character of the

In Witt *v.* Witt and Klindworth, 1862, 32 L. J. Mat. 179, Sir C. Cresswell rejected *letters* written by a patient to a medical man describing his symptoms. Sed qu.

[1] R. *v.* Johnson, 1847, 2 C. & K. 355; R. *v.* Blandy, 1752, 18 How. St. Tr. 1187.

[2] Aveson *v.* Ld. Kinnaird, 1805, 6 East, 188; R. *v.* Guttridge, 1840, 9 C. & P. 473.

[3] R. *v.* Wink, 1834, 6 C. & P. 397; commented upon in R. *v.* Osborne, 1842, C. & Marsh. 624. The witness, however, cannot be further asked whether on making the complaint, prosecutor mentioned anyone's name. Id.

[4] R. *v.* Osborne, [1905] 1 K. B. 551.

[5] R. *v.* Walker, 1839, 2 M. & Rob. 212; R. *v.* Osborne, 1842, C. & Marsh. 624; R. *v.* Quigley, 1842, Ir. Cir. R. 677; R. *v.* Wood, 1877, 14 Cox, C. C. 46.

[6] R. *v.* Osborne, [1905] supra; R. *v.* Lillyman, [1896] 2 Q. B. 167 (C. C. R.); R. *v.* Rowland, 1898, 62 J. P. 459 (Hawkins, J.). It was at one time thought that this evidence was only admissible in cases where non-consent was a material element (see R. *v.* Kingham, 1902, 66 J. P. 393); this, however, is not now the law.

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question put, as well as other circumstances, such as the relation of the questioner to the prosecutrix, is such as to render the statement not voluntary and therefore inadmissible.[1]

§ 582. In consequence, too, of the general rule[2] that the *mental feelings* of individuals may be shown by proof of what they naturally expressed at the time, in petitions for damages on the ground of adultery,[3] if it be material, with the view to damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.[4] But here, to guard against abuse, it is required to be proved by some evidence, independent of the date appearing on the face of the letters,[5] that they were written by the wife to the husband prior to any suspicion of misconduct on her part, and, consequently, at a time when it cannot be supposed that there was any reason for collusion.[6] It is not, however, necessary, in the absence of other suspicious circumstances, to explain why the husband and wife were living apart at the time when the letters were written,[7] though of course it is expedient that such explanation should, if possible, be given.

§ 583.[8] Another rule is that *declarations and acts* which form what is called part of the res gestæ are not regarded as hearsay, but admitted as original evidence. It is not easy to explain of what the res gestæ consists. The best explanation of the principle which admits evidence of res gestæ is this. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and each in turn

[1] R. *v.* Osborne, [1905] supra, considering and explaining R. *v.* Merry, 1900, 19 Cox, C. C. 442 (Bruce, J.).

[2] Supra, § 580.

[3] See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

[4] Trelawney *v.* Coleman, 1817, 2 Stark. R. 193; Willis *v.* Bernard, 1832, 1 L. J. C. P. 118; Winter *v.* Wroot, 1834, 1 M. & Rob. 404; Gilchrist *v.* Bale, 1839, 8 Watts, 355 (Am.).

[5] Trelawney *v.* Coleman, 1817, 2 Stark. R. 193; Houliston *v.* Smyth, 1825, 2 C. & P. 24.

[6] Edwards *v.* Crock, 1801, 4 Esp. 39; Trelawney *v.* Coleman, 1817, 2 Stark. R. 193; Wilton *v.* Webster, 1835, 7 C. & P. 198. See Wyndham's Divorce Bill, 1855, 3 Macq. 54 (H. L.).

[7] Trelawney *v.* Coleman, 1817, 2 Stark. R. 193.

[8] Gr. Ev. § 108, in great part.

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§ 583. becomes the prolific parent of others: each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. Consequently, these surrounding circumstances may always be shown to the jury along with the principal fact, as it constitutes part of the res gestæ, in other words of the transaction if looked at in its entirety and as a whole. It is impossible to say in each case how the individual judge will exercise his discretion. For there are no fixed principles for dealing with this question;[1] the application of the doctrine of res gestæ is consequently hard to understand. In America an attempted definition of *res gestæ* is that the *res gestæ* consists of "the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character."[2] Perhaps the best general idea of what is meant by res gestæ, is that this expression includes everything that may be fairly considered "an incident of the event under consideration." The following examples may serve as illustrations of rulings upon the point, and would doubtless be followed if ever a similar, or nearly similar, state of matters arose. Thus, on the trial of Lord George Gordon for treason, the cry of the mob, who accompanied the prisoner, was received in evidence, as forming part of the res gestæ, and showing the character of the principal fact.[3] What the driver of a train said directly after a child has been knocked down by his train is also evidence.[4] On an indictment for manslaughter, a statement as to how the accident happened, made by the deceased immediately after he was knocked down, has been held admissible.[5] Even evidence as to what the wife said immediately after the occurrence, was received in an action by

[1] Per Parke, J., in Rawson *v.* Haigh, 1824, 2 Bing. 104; Ridley *v.* Gyde, 1832, 9 Bing. 349, 352; Pool *v.* Brydges, 1826, 4 Pick. 379 (Am.); Allen *v.* Duncan, 1831, 11 Pick. 309 (Am.).

[2] Pinney *v.* Jones, 1894, 42 Am. St. R. 209.

[3] R. *v.* Ld. George Gordon, 1781, 21 How. St. Tr. 535.

[4] Hermes *v.* Chicago Ry. Co., 1891, 27 Am. St. R. 69 (Am.); International Ry. Co. *v.* Anderson, 1891, 27 Am. St. R. 907 (Am.). Compare, post, note [7] to § 584.

[5] R. *v.* Foster, 1834, 6 C. & P. 325 (Parke and Patteson, JJ., and Gurney, B.), questioned by Cockburn, C.J., in R. *v.* Bedingfield, 1879, 14 Cox, C. C. 341, and in a subsequent pamphlet, but supported by the author in a letter to the Chief Justice in reply, published by Messrs. Maxwell in 1880.

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husband and wife for wounding the wife.[1] Directions given by an alleged owner of goods to a person to whom he has given actual possession of such goods, to the effect that the goods are to be treated as a certain person, who has since become bankrupt, should direct on calling, are evidence on a question of title arising between the alleged owner of such goods and the bankrupt's assignees.[2]

§ 584. Generally where a person enters upon land to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin,[3] or the like; or changes his actual residence, or domicil,[4] or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does, or suffers, any other act material to be understood;[5] his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts.[6] Thus, in a suit for enticing away a servant, his statement at the time of leaving his master will be received, as tending to show the *motive* of his departure.[7] Similarly, upon an inquiry as to the state of mind, sentiments, intentions, or opinions[8] of a person

[1] Thompson *v.* Trevanion, 1694, Skin. 402 (Ld. Holt).

[2] Sharp *v.* Newsholme, 1839, 9 L. J. C. P. 211.

[3] Co. Lit. 49 *b*, 245 *b*; Robison *v.* Swett, 1825, 3 Greenl. 316 (Am.).

[4] Brodie *v.* Brodie, 1861, 30 L. J. Mat. 185.

[5] Parrott *v.* Watts, 1877, 47 L. J. C. P. 79; Mutual Life, &c. *v.* Hillman, 1892, 145 U. S. 285.

[6] Bateman *v.* Bailey, 1794, 5 T. R. 512, and the observations of Mr. Evans upon it, in 2 Poth. Obl. App. No. xvi. § 11; Rawson *v.* Haigh, 1824, 2 Bing. 99; Vacher *v.* Cocks, 1829, M. & M. 353; Smith *v.* Cramer, 1835, 1 Bing. N. C. 585; Doe *v.* Arkwright, 1833, 5 C. & P. 575; Lord *v.* Colvin, 1857, 4 Drew. 366; Gorham *v.* Canton, 1828, 5 Greenl. 266 (Am.); Thorndike *v.* City of Boston, 1840, 1 Metc. 242 (Am.); Lund *v.* Tyngsborough, 1851, 9 Cush. 37, 43 (Am.). In R. *v.* Edwards, 1872, 12 Cox, C. C. 230, Quain, J., on a trial of wife murder, allowed a witness to state what the wife had said about her husband a week before her death, on bringing to the cottage of the witness an axe and carving knife to be taken care of. Sed qu. as to this case.

[7] Hadley *v.* Carter, 1835, 8 New Hamps. 40. See, however, R. *v.* Wainwright, 1876, 13 Cox, C. C. 171, and R. *v.* Pook, 1871, 13 Cox, C. C. 172, et qu. In Roscoe's Nisi Prius (16th edit. Vol. I. p. 619), it is stated that the declarations of a coach-driver as to the loss of a parcel sent by coach are evidence against his master, and Mayhew *v.* Nelson, 1833, 6 C. & P. 58, is cited for this. But the proposition is too broadly stated; declarations by a servant are only evidence *if made at the time*. See ante, § 583.

[8] Barthelemy *v.* The People, &c., 1842, 2 Hill, N. Y. 248 (Am.).

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§§ 584—586.

at any particular period, his contemporaneous declarations are admissible as parts of the res gestæ, though evidence of this nature is seldom entitled to much weight.[1]

§ 585. The operation of the doctrine that statements may be admissible in some cases as part of the res gestæ is so extensive that it may sometimes even override the general provision of law, which precludes a party's declarations from being evidence for himself. For example, in an action for falsely representing the solvency of a stranger, whereby the plaintiffs were induced to trust him with goods, statements by them at the time when the goods were supplied, that they trusted him in consequence of the representation, were received as evidence on their behalf;[2] and in an action against a bailee for loss by negligence, his declarations, contemporaneous with the loss, are, in America, admissible in his favour, as tending to show the nature of the loss.[3] But witnesses called to speak to what defendant said at a meeting held on a certain date, though they may be cross-examined as to the whole conversation at that meeting, cannot be asked (with a view to explaining his intentions or conduct) what defendant said on other occasions.[4]

§ 586. In the practical application of the doctrine as to the admission of evidence as part of the res gestæ, two points deserve especial attention. The first is, that declarations,—though admissible as evidence of the declarant's *knowledge or belief* of the facts to which they relate, and of his *intentions* respecting them,—are no proof whatever of the facts themselves. If it be necessary to show the existence of such facts, proof aliundè must be laid before the jury. Indeed, it seems that, in strict practice, this proof should be given in the first instance, before the court be called upon to receive evidence of the declarations. For instance, the fact of insolvency must be

[1] Hodgson *v.* De Beauchesne, 1858, 12 Moo. P. C. C. 285, 317, cited with approbation (Jessel, M.R.) in Doucet *v.* Geoghegan, 1878, 9 Ch. D. 441; Haldane *v.* Eckford, 1869, L. R. 8 Eq. 361; and Doucet *v.* Geoghegan, 1878, 9 Ch. D. 441.

[2] Fellows *v.* Williamson, 1829, M. & M. 306. See, also, Milne *v.* Leisler, 1862, 31 L. J. Ex. 257.

[3] Story, Bail. § 339; citing Tomkins *v.* Saltmarsh, 1826, 14 Serg. & R. 275. See, also, Beardslee *v.* Richardson, 1833, 11 Wend. 25 (Am.).

[4] See 21 How. St. Tr. 542, 543 (1781).

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established before statements of the insolvent to show that he was aware of his embarrassed circumstances will be admitted.[1]

§ 587. The second point to be observed with regard to the admission of hearsay evidence is, that, although acts, by whomsoever done, are res gestæ when they are relevant to the matter in issue,[2] yet if they be *irrelevant*, both the acts themselves and the declarations qualifying or explaining them will be rejected. For instance, in an action against a town for injuries sustained through a defect in a highway, the declarations of a surgeon, since deceased, made at the time of examining the plaintiff's wounds, have been rejected as evidence of the nature and extent of the injuries, the declarations being no more than the mere hearsay expression of a professional opinion.[3] To non-attention to this principle was due one of the main fallacies in support of the contention that letters written *to* a person are evidence (which we have seen that they are not)[4] in support of his sanity. For such a letter, if admissible at all, must be so, either because the act done in writing and sending it is evidence in itself, or because the opinion which is inferentially expressed by it being done is evidence. But the act done (that of writing and sending the letter) is (like the medical examination in the case just cited) obviously immaterial to the strict issue (that of

[1] Thomas *v.* Connell, 1838, 7 L. J. Ex. 306; Craven *v.* Halliday (no date), cited 4 M. & W. 270 (Parke, B.); Vacher *v.* Cocks, 1829, M. & M. 353. Sometimes, indeed, under the law relating to bankrupts, the truth of the facts need not be proved. Again, if an act relied on as an act of bankruptcy be an absenting with intent to delay creditors, a declaration by the bankrupt that he left home to avoid a writ will be admissible, though no evidence be given that any writ was actually out against him, because in order to constitute this act of bankruptcy, neither writ nor pressure is in fact necessary (Rouch *v.* Gt. West. Ry. Co., 1841, 1 Q. B. 63; Newman *v.* Stretch, 1829, M. & M. 338; Ex parte Bamford, 1809, 15 Ves. 449; Robson *v.* Rolls, 1833, 2 L. J. C. P. 80; but the departure from home, which is the substantive act, must be proved by evidence independent of the declaration; and being an act in itself equivocal, the statement of the bankrupt, made during its continuance, is admissible to show the intention with which it was done.

[2] Wright *v.* Doe *d.* Tatham, 1837, 7 A. & E. at p. 355, per Parke, B.

[3] Lund *v.* Tyngsborough, 1851, 9 Cush. 37, 43 (Am.). The case is also useful as containing the following dictum: "When the act of a party may be given in evidence, his declarations made at the time and calculated to elucidate and explain the character and quality of the act and so connected with it as to constitute one transaction and so as to derive credit from the act itself, form part of the res gestæ and are admissible in evidence."

[4] Supra, § 572.

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§§ 587, 588.

sanity or insanity); and[1] where the declaration per se cannot be received, no case has yet established that the union of the two things (the irrelevant act and the accompanying declaration) will render them admissible.[2]

§ 588. In all these cases the principal points for consideration are, whether the *circumstances and declarations* offered in proof were *so connected with the main fact* under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was at one time thought necessary that they should be *contemporaneous* with it;[3] but it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential.[4] For example, what a bankrupt said immediately on his return home, as to the place where he had been, and his motive in going, is admissible;[5] where a disputed act of bankruptcy is whether a transfer was fraudulent or not, a declaration by the bankrupt, in which he gave a false account of the matter, made nearly a month after it had taken place, to a creditor, who had pressed for payment of his debt immediately before the transfer, and had been promised security for the following day; when, instead of keeping his word, the bankrupt had transferred his property to a relative, and had absconded, was held to be receivable in evidence.[6] And where a trader had absented himself from home during the latter half of February and the commencement of March, two letters written by him on the 16th of January, in which he had asked for time on some bills of exchange payable in February, were admitted in evidence, as tending to throw light

[1] As before observed, § 572.

[2] See per Coltman, J., in Wright *v.* Doe *d.* Tatham, 1837, 7 A. & E. 361, ante, § 572.

[3] This seems still to be the law in America. In Enos *v.* Tuttle, 1820, 3 Conn. 250 (Am.), Hosmer, C.J., observed, that declarations, to become part of the res gestæ, "must have been made *at the time of the act done*, which they are supposed to characterise, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonise with them, as obviously to constitute one transaction."

[4] Rouch *v.* Gt. West. Ry. Co., 1841, 1 Q. B. 63.

[5] Bateman *v.* Bailey, 1794, 5 T. R. 512, recognised by the court in Rouch *v.* Gt. West. Ry. Co., 1841, 1 Q. B. 63.

[6] Ridley *v.* Gyde, 1832, 2 L. J. C. P. 25; dissentiente Gaselee, J., but recognised and confirmed in Rouch *v.* Gt. West. Ry. Co., 1841, 1 Q. B. 63.

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on the cause of his absence.[1] Indeed, these cases exemplify the remarks of Mr. Justice Park,[2] namely, "that it is impossible to tie down to time the rule as to the declarations," and that, if connecting circumstances exist, a declaration may, even at a month's interval, form part of the whole res gestæ.

§ 589.[3] Still, an act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere *narrative of a past occurrence*, or by an *isolated* conversation held, or an isolated act done, at a later period.[4] Accordingly, the schedule of an insolvent, delivered four months after his execution of a deed of assignment, has been rejected when tendered by the assignees as evidence that the indenture was executed with intent to petition;[5] and where a creditor called upon a bankrupt in the morning, and being told that he was out, paid a second visit in the evening of the same day, when the bankrupt made a statement respecting his absence in the morning, this statement was held inadmissible for the purpose of showing that the bankrupt had intentionally denied himself to his creditors, it being, he considered, too remote in point of time from the absence which it purposed to explain.[6] But declarations made, or letters written, during absence from home, explanatory of the motive of departure, are nevertheless admissible as original evidence, the departure and absence being regarded as one continuing act.[7]

§ 590.[8] Similar principles to those just mentioned, namely, that the *acts* and the *declarations* must be connected together as regards time and otherwise, apply to the reception of evidence of the *acts* and *declarations* of one of several individuals in a company of *conspirators* as evidence against his fellows. Here, a foundation should first be laid by proof, sufficient, in the

[1] Smith *v.* Cramer, 1835, 1 Bing. N. C. 585.

[2] In Rawson *v.* Haigh, 1824, 2 Bing. 104.

[3] Gr. Ev. § 110, slightly.

[4] Hyde *v.* Palmer, 1862, 32 L. J. Q. B. 126.

[5] Peacock *v.* Harris, 1836, 5 A. & E. 449.

[6] Lees *v.* Marton, 1832, 1 M. & Rob. 210. It is, however, hardly possible to reconcile this case with Bateman *v.* Bailey, 1794, 5 T. R. 512, cited ante, § 588, n. [5], and it possibly would now be considered as applying the principle stated in the text too strictly.

[7] Rouch *v.* Gt. West. Ry. Co., 1841, 1 Q. B. 63; Rawson *v.* Haigh, 1824, 2 Bing. 104.

[8] Gr. Ev. § 111, in great part.

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§§ 590, 591.

opinion of the judge, to establish primâ facie the fact of conspiracy between the parties, or, at least, proper to be laid before the jury, as tending to establish such fact. The connexion of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them.[1]

§ 591. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before proof of the conspiracy has been given; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this mode of proceeding rests in the discretion of the judge, and in seditious or other general conspiracies is seldom permitted, except under particular and urgent circumstances. If it were, the jury might be misled to infer the fact of the conspiracy itself from the declarations of strangers. Still, as a conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence, the detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession relative to the main design, will sometimes from necessity be admitted, as steps to establish the conspiracy itself. On this subject it is difficult to establish a general inflexible rule, and each case must, in some measure, be governed by its own peculiar circumstances.[2]

[1] R. *v.* Stone, 1796, 6 T. R. 528, 529; American Fur Co. *v.* U. S., 1829, 2 Peters, 358 (Am.); Crowninshield's case, 1830, 10 Pick. 497 (Am.); U. S. *v.* Gooding, 1827, 12 Wheat. 469 (Am.); Com. *v.* Eberle, 1817, 3 Serg. & R. 9 (Am.). In R. *v.* M'Kenna, 1842, Ir. Cir. R. 461, Pennefather, C.J., said: — "It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance, where you seek to give in evidence against him the declaration of a co-conspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admissions."

[2] See R. *v.* Blake, 1844, 13 L. J. M. C. 131; Ford *v.* Elliot, 1849, 18 L. J. Ex. 447.

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§ 592.[1] It makes no difference at what *time* the party accused is proved to have entered into the conspiracy or combination; because every one, who agrees with others to effect a common illegal purpose, is generally considered in law as a party to every act, which either had before been done, or may afterwards be done, by the confederates, in furtherance of the common design.[2] One or two individuals may have concocted the scheme, but all who afterwards join in carrying it out are equally guilty with the originators;[3] at least, if any evidence be forthcoming from which their adoption of the previous acts of the association can reasonably be inferred.[4] Neither does it matter whether the acts were done, or the declaration made, in the *presence* or in the *absence* of the accused, but everything said or done by any one of the conspirators or accomplices in furtherance of the common object is evidence against each and all of the parties concerned, whether they were present or absent, and whether or not they were individually aware of what was taking place.[5] For example, it is on this principle that (as we have seen)[6] the cries of a mob, with whose proceedings the prisoner is connected, though made in his absence, are admissible against him, as explanatory of the objects which he, in common with the multitude, had in view;[6] proof of expressions used by persons going to a meeting convened by the defendant is admissible,[7] and papers supporting a defendant views, publicly sold at meetings convened by him, may be received in evidence, though no proof be given connecting the defendants with the persons selling the papers.[8]

§ 593. Care, however, must be taken to distinguish between declarations, which are either acts in themselves purporting to advance the objects of the criminal enterprise, or which accompany and explain such acts, and those statements (not amounting, course, to admissions by the accused himself), whether written

[1] Gr. Ev. § 111, in part.
[2] R. *v.* Watson, 1817, 2 Stark. R. 139.
[3] R. *v.* Murphy, 1837, 8 C. & P. 310.
[4] R. *v.* O'Connell, 1843-4, Arm. & T. 163 (Ir.).
[5] R. *v.* Brandreth, 1817, 32 How. St. Tr. 857.
[6] R. *v.* Ld. George Gordon, 1781, 21 How. St. Tr. 535, supra, § 583; cited by Buller, J., in R. *v.* Hardy, 1794, 24 How. St. Tr. 704. See R. *v.* Petcherini, 1856, 7 Cox, C. C. 79.
[7] R. *v.* Hunt, 1820, 3 B. & Ald. 566; Redford *v.* Birley, 1822, 3 Stark. R. 85.
[8] R. *v.* O'Connell, 1843-4, Arm. & T. 163 (Ir.).

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§§ 593, 594. or oral, which, although made during the continuance of the plot, are in fact a *mere narrative* of the measures that have already been taken. These last statements are, as before explained,[1] inadmissible. For example, a letter, written by a co-conspirator to a private friend, who was unconnected with the plot, giving an account of the proceedings of a society to which the writer and the defendant were proved to have belonged, and enclosing several seditious songs stated to have been composed by the writer, and sung by him at a meeting of the society, has been rejected, on the ground that such letter was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot, and, as such, only admissible against himself.[2] On the other hand, a letter written by a co-conspirator to a delegate in the country, describing the events that had occurred in London, *and encouraging him thereby to proceed in the criminal business in which he was engaged*, being considered by the court as an act done in furtherance of the plot, has been received against the defendant, though no evidence was given to show that it had ever reached the person for whose perusal it was intended.[3]

§ 594. In a similar way entries in books made in furtherance of a conspiracy are admissible,[4] but memoranda of payments made *after* the fraud by one conspirator to another are not.[5] Neither is evidence of a conversation overheard between men apparently *returning* from a meeting, held within an hour before, about half a mile off, though it be offered as evidence, not only of the general nature of the meeting, but of the effect that was likely to be produced by the language there employed.[6] In a word, the declarations of a conspirator or accomplice are receivable against his fellows only when they are in themselves acts, or when they accompany and explain acts, for which the

[1] Ante, § 589.

[2] R. *v.* Hardy, 1794, 24 How. St. Tr. 704 (Eyre, C.J., Macdonald, C.B., and Hotham, B., Buller and Grose, JJ., diss.). In R. *v.* Watson, 1817, 2 Stark. R. 139, Ld. Ellenborough observed that there was a great weight in the arguments of Buller and Grose, JJ.

[3] R. *v.* Hardy, supra (Macdonald, C.B., Hotham, B., Buller and Grose, JJ., Eyre, C.J., dubit.).

[4] R. *v.* Blake, 1844, 13 L. J. M. C. 131.

[5] Id.

[6] R. *v.* O'Connell, 1843-4, Arm. & T. 163 (Ir.). See, also, R. *v.* Murphy, 1837, 8 C. & P. 310; R. *v.* Watson, 1817, 2 Stark. R. 139.

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others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.

§ 595. On a somewhat similar principle, if, after his apprehension, papers be found on the person or at the lodgings of a co-conspirator, they will be admissible or not against other alleged co-conspirators according as there is or is not evidence that they existed previously to the arrest of the prisoner who is on his trial. If there be no such evidence, they will be rejected, as a prisoner cannot be responsible for acts or writings which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end;[1] but if their previous existence be established, either by direct proof, or by strong presumptive evidence, no objection to their admissibility can prevail.[2]

§ 596. On an indictment for conspiracy, unpublished *writings* upon *abstract subjects* are certainly admissible in evidence if it be proved that they were intended to be used in furtherance of the common design.[3] Possibly, too, such writings, although no proof that they were connected with the common design was given, would be in strictness admissible if they appeared to be *closely connected* with the nature and object of the alleged crime; but unpublished writings upon abstract subjects of a kindred nature with the crime charged, but having no direct relation to it, are certainly inadmissible.[4] Where *conversations* of co-conspirators or accomplices are proved, the effect of the evidence will of course depend upon the surrounding circumstances, such as the fact and degree of the prisoner's attention to what was said, and his approval or disapproval thereof.[5]

[1] R. *v.* Hardy, 1794, 24 How. St. Tr. 704.

[2] R. *v.* Watson, 1817, 2 Stark. R. 139. See R. *v.* M'Cafferty, 1866–7, Ir. R. 1 Cl. 363. There acts of insurrection committed after the arrest of the prisoner, but in consequence of instructions given by him before he was apprehended, were held to be admissible in evidence on a charge of conspiracy to raise rebellion.

[3] R. *v.* Watson, 1817, 2 Stark. R. 139.

[4] In Algernon Sidney's case, 1683, 9 How. St. Tr. 854, observed upon (Abbott, J.) in R. *v.* Watson, 1817, 2 Stark. R. 139, a treatise containing speculative republican doctrines, which not only was unpublished and apparently unconnected with the treasonable practices of which he was accused, but had been composed several years before the trial, was, indeed, admitted in evidence (Jefferies, J.). But subsequent times have regarded this trial as a judicial murder.

[5] R. *v.* Hardy, 1794, 24 How. St. Tr. 704.

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§§ 597, 598.

§ 597. The *declarations* of *co-trespassers* in civil actions are governed by rules similar to those in cases of conspiracy which we have just been considering; that is, if several are jointly sued, the declarations of each, which constitute parts of the res gestæ, are admissible against all;[1] while those which amount to mere admissions, or narratives of past events, can only be received against the party making them.[2] Where no common object or motive is imputed, as in actions for negligence, the declaration of each defendant is admissible against himself alone.[3]

§ 598.[4] The principles just discussed also apply to cases of *partnership*. Whenever any number of persons are associated together in the joint prosecution of a common enterprise or design in partnership, the act or declaration of each member, in furtherance of the common object of the association, is the act or declaration of all. By the very act of association each partner is constituted the agent of the others and of the firm, for all purposes within the scope of the partnership concern;[5] and his acts and declarations bind his co-partners and the firm, unless he has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. Thus an admission or representation made by one partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.[6] While the firm thus created exists, it speaks and acts only by the several

[1] See R. *v.* Hardwick, 1809, 11 East, 585; Powell *v.* Hodgetts, 1826, 2 C. & P. 432; North *v.* Miles, 1808, 1 Camp. 389; Bowsher *v.* Calley, 1808, 1 Camp. 391, n.

[2] Daniels *v.* Potter, 1830, M. & M. 501. The case of Wright *v.* Court, 1825, 2 C. & P. 232—where, in an action for false imprisonment, Garrow, B., admitted the declarations of a co-defendant, showing personal malice, as evidence against the other defendants, though made in their absence, and several weeks after the act complained of—probably would not now be regarded as a safe precedent.

[3] Daniels *v.* Potter, 1830, M. & M. 501.

[4] Gr. Ev. § 112, in part.

[5] Sandilands *v.* Marsh, 1819, 2 B. & Ald. 673; R. *v.* Hardwick, 1809, 1 C. & P. 98, n.; Fox *v.* Clifton, 1830, 6 Bing. 792; Nicholls *v.* Dowding, 1815, 1 Stark. R. 81; Hodenpyl *v.* Vingerhoed, 1818, Chitty on Bills, 627, n. (*q*); Van Reimsdyk *v.* Kane, 1813, 1 Gall. 630 (Am.); Coit *v.* Tracy, 1830, 8 Conn. 268 (Am.); 53 & 54 V. c. 39 ("The Partnership Act, 1890"), § 5; ante, § 185.

[6] 53 & 54 V. c. 39, § 17.

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members; but when that existence ceases by dissolution, the subsequent acts of the individual members are binding on themselves alone,[1] except so far as they may be acts necessary to wind up the affairs of the partnership, or to complete transactions begun but unfinished at the time of the dissolution.[2] Declarations and admissions, however, made after the dissolution relating to the previous business of the firm are admissible against all the partners interested in the transaction,[3] as in a case where one partner in a firm which has been dissolved has admitted, subsequently to the dissolution, the payment of a debt due to the firm.[4]

§ 599. In cases such as that just instanced, the party making the admission must, however, be, at the time, jointly interested with the parties against whom his statement was tendered in evidence.[5] Where, therefore, a bill was filed to set aside a bond given to a banking firm on the ground of fraud, and before the commencement of the suit the partner, who originally managed the transaction, had retired from the firm, and ceased to have any longer an interest in the bond, his answer was held not to be receivable in evidence against the continuing partners.[6]

§ 600. Notwithstanding the provisions contained in § 14 of Lord Tenterden's Act,[7] and in § 14 of the Mercantile Law Amendment Act, 1856,[8] as to acknowledgments by one of two or more co-debtors, and the former doubts expressed upon the subject,[9] it appears now to be settled law that a payment on account of a debt, or a written acknowledgment made by a partner in the usual course of business, is sufficient to take a partnership debt out of the Statute of Limitations as against the other members of the firm, the partner being presumed to have

[1] Wood *v.* Braddick, 1808, 1 Taunt. 105; Petherick *v.* Turner, 1802, cited 1 Taunt. 105; Kilgour *v.* Finlyson, 1789, 1 H. Bl. 155.

[2] 53 & 54 V. c. 39, § 38.

[3] Wood *v.* Braddick, 1808, 1 Taunt. 105. See Parker *v.* Morrell, 1848, 2 Phill. 453.

[4] Pritchard *v.* Draper, 1830–31, 1 Russ. & My. 191. Loomis and Jackson *v.* Loomis, 1854, 3 Deane, Verm. R. 198 (Am.), expressly supports the general proposition in the text.

[5] See, and compare, the observations of Ld. Cottenham in Parker *v.* Morrell, 1848, 2 Phill. 464, 465; of the reporter in S. C. 464, n. (*b*); and of Cresswell, J., in S. C. on issue tried at Nisi Prius, 2 C. & Kir. 603.

[6] Parker *v.* Morrell, 1848, 2 Phill. 453.

[7] 9 G. 4, c. 14.

[8] 19 & 20 V. c. 97.

[9] See prior editions of this work, §§ 600, 601.

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§§ 600—602.

authority to act for the firm in making the payment or giving the acknowledgment.[1]

§ 601. After a dissolution, however, the authority of the late partners to bind one another in this respect is determined,[2] unless the facts are such as to lead to the inference that the payment is made or acknowledgment given as agent for the other partners.[3]

§ 602.[4] The *declarations of agents* are admissible against their principals on grounds very similar to those which govern the declarations of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does *in the lawful prosecution* of that business, is the act of the principal. As Mr. Justice Story observes, "where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the res gestæ."[5] They are original evidence and not hearsay; and, being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them.[6] Still, the admission or declaration of an agent binds his principal only when made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*.[7] When the agent's right to interfere in the particular matter has ceased, the principal is no longer affected by his declarations, any more than by his acts, but they will be rejected in such case as mere hearsay.[8]

[1] Goodwin *v.* Parton, 1880, 42 L. T. 568; In re Tucker, [1894] 3 Ch. 429; Watson *v.* Woodman, 1875, L. R. 20 Eq. 730; and see Lindley on Partnership, 6th ed. p. 271, and § 13 of 19 & 20 V. c. 97, and see post, §§ 744, 745.

[2] Watson *v.* Woodman, supra.

[3] In re Tucker, supra.

[4] Gr. Ev. § 113, in part.

[5] Story, Agen. § 134.

[6] Doe *v.* Hawkins, 1841, 10 L. J. Q. B. 285.

[7] See Kirkstall Brewery Co. *v.* Furness Ry. Co., 1874, L. R. 9 Q. B. 468; Re Devala Prov. Gold Min. Co., 1883, 22 Ch. D. 593.

[8] Fairlie *v.* Hastings, 1804, 10 Ves. 123, 126; Garth *v.* Howard, 1832, 8 Bing. 451; Langhorn *v.* Allnutt, 1812, 4 Taunt. 519; Betham *v.* Benson, 1818, Gow, R. 45; Mortimer *v.* M'Callan, 1840, 6 M. & W. 68; R. *v.* Hall, 1838, 8 C. & P. 358; The Mechanics' Bk. of Alexandria *v.* Bk. of Columbia, 1820, 5 Wheat. 336 (Am.); Hannay *v.* Stewart, 1837, 6 Watts, 487 (Am.); Stockton *v.* Demuth, 1838, 8 Watts, 39 (Am.); Stewartson *v.* Watts, 1839, 8 Watts, 392 (Am.); Baring *v.* Clark, 1837, 19 Pick. 220 (Am.); Bk. of Monroe *v.* Field, 1842, 2 Hill, R. 445 (Am.); Story, Agen. §§ 134, 137.

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§ 603. Accordingly, when a horse dealer, or livery-stable keeper, employs a servant to sell a horse, any statement made by him respecting the horse *at the time of sale*, even though it amount to a warranty of soundness,[1] which the servant has been really ordered not to give, will bind the master.[2] But the servant's declarations or acknowledgments *at any other time*, whether made to the purchaser or to a stranger, will not be received.[3] Again, if a letter written by an agent form the whole or part of an agreement, which by the course of his business he was authorised to make, it will be admissible against the principal, but if it be offered as proof of the contents of a pre-existing contract, or if it contain an account of transactions already performed, it will probably be rejected, though addressed to the principal himself;[4] unless the principal has replied to it, or has otherwise adopted or acted upon it, in which case the agent's letter will be received as explanatory of the principal's conduct.[5] On the same principle a letter, written during the voyage, by the master of a ship to the owners, while admissible against the latter as to the *facts* it states, is not so as evidence of the master's opinion.[6] The rules are the same as to an engineer's log-book kept during the voyage.[7]

§ 604. Sir William Grant has well explained the law upon this subject as follows:[8] "As a general proposition," said he, "what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the

[1] Brady *v.* Tod, 1861, 30 L. J. C. P. 224. But the servant of a private owner, intrusted to sell a horse, not at a fair or public mart, but on some one particular occasion, has no implied authority to bind his master by a warranty: Id. 223. See Miller *v.* Lawton, 1864, 15 C. B. (N.S.) 834.

[2] Howard *v.* Sheward, 1866, L. R. 2 C. P. 148.

[3] Allen *v.* Denstone, 1839, 8 C. & P. 760; Helyear *v.* Hawke, 1803, 5 Esp. 72. See, also, Peto *v.* Hague, 1804, 5 Esp. 134; Gt. West. Ry. Co. *v.* Willis, 1865, 34 L. J. C. P. 195.

[4] Fairlie *v.* Hastings, 1804, 10 Ves. 128; Laughorn *v.* Allnutt, 1812, 4 Taunt. 511; Kahl *v.* Jansen, 1812, 4 Taunt. 565; Reyner *v.* Pearson, 1812, 4 Taunt. 662.

[5] Coates *v.* Bainbridge, 1828, 5 Bing. 58.

[6] The Solway, 1885, 10 P. D. 137.

[7] The Earl of Dumfries, 1885, 10 P. D. 31.

[8] In Fairlie *v.* Hastings, 1804, 10 Ves. 126, 127.

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§§ 604, 605.

agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently end to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent. * * * The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say that a man is precluded from questioning or contradicting anything any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

§ 605. As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, such declarations only bind the principal so far as the agent had legal power to make them.[1] For example, the declarations and acts of an agent cannot bind an infant, because an infant cannot appoint an agent; so that, if an infant, even by letter of attorney, appoints a person to make a lease, he will not be bound thereby, neither will his ratification bind him; but such lease, to be good, must be the infant's own personal act.[2] Questions of much nicety often occur, where power to make an admission is sought to be inferred by implication from an authority to do a certain act. Thus, where a wife is authorised, in her husband's absence, to carry on the business of his shop, her admissions, made on

[1] See Faussett *v.* Faussett, 1849, 7 Notes of Cases, Ecc. & Mar. 93; Hogg *v.* Garrett, 1849, 12 Ir. Eq. R. 559.

[2] Doe *v.* Roberts, 1847, 16 M. & W. 778. See Hargrave *v.* Hargrave, 1850, 19 L. J. Ch. 261.

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§§ 605, 606.

application to pay for goods previously delivered at the shop, will be evidence against the husband.[1] But proof of her acknowledgments of an antecedent contract for the hire of the shop, or of her agreement to make a new contract for the future occupation of it, will be rejected, as it cannot be necessary that the wife should have this extensive power of binding her husband for the mere purpose of conducting the business of the shop.[2] The declarations of a bank manager made behind the bank's counter as to the usual course of business at a bank are evidence against the bankers.[3] The declarations of a pawnbroker's shopman made behind the shop counter that his master had received goods said to have been deposited with him in the ordinary course of his business, would probably be admissible against the master, because it might well be assumed that the shopman was authorised to answer any inquiries respecting the goods, made by persons interested in them. But if, in the case last suggested, the admission related to a transaction unconnected with the immediate business of the shop,—as, for instance, if it referred to the loan of several hundred pounds on a single pledge at five per cent. interest,—it would not be received.[4] So again, although the solicitor of a judgment creditor may fairly be assumed to have acted as his client's agent in directing the issue of a fi. fa., because the taking such a step might be essentially necessary for the benefit of the client, yet special instructions to seize particular goods cannot be considered within the scope of any implied authority.[5]

§ 606.[6] To sum up: there are *three classes of declarations*, which, though treated under the head of hearsay, are, in truth, *original* evidence. The *first* class consists of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the *second* includes expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; and the

[1] Clifford *v.* Burton, 1823, 1 Bing. 199.
[2] Meredith *v.* Footner, 1843, 12 L. J. Ex. 183.
[3] Simmons *v.* London Joint Stock Bank, [1892] A. C. 201.
[4] Garth *v.* Howard, 1832, 8 Bing. 451.
[5] Smith *v.* Keal, 1882, 9 Q. B. D. 340 (C. A.).
[6] Gr. Ev. § 123, in great part.

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§ 606. *third* class embraces all other cases, in which the declaration offered in evidence may be regarded as part of the res gestæ. These classes are all involved in the principle of the last, and have been separately treated merely for the sake of greater distinctness.

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CHAPTER III.

MATTERS OF PUBLIC AND GENERAL INTEREST.

§§ 607, 608.

§ 607.[1] HAVING illustrated the nature of hearsay evidence, shown the reasons on which it is generally excluded, and explained the distinction between such evidence and that which is original, it will next be convenient to consider *the cases in which the rule rejecting hearsay has been relaxed.* These may be conveniently divided into six classes: first, those relating to matters of public and general interest; secondly, those relating to pedigree; thirdly, those relating to ancient possession; fourthly, declarations against interest; fifthly, declarations in the course of office or business; and lastly, dying declarations. It will be observed, that these exceptions, which are allowed only on the ground of the assumed absence of better evidence, and, as it were, from necessity, meet most of the inconveniences that would result from a stern and universal application of the rule, and thus remove the principal objections which have been urged against it. These six exceptions will now be discussed in their order.

§ 608. And *first*, the admissibility of hearsay evidence respecting matters of *public and general interest*, rests mainly on the following grounds:—that the origin of the rights claimed is usually so ancient, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights much lessens the probability, if it does not exclude the possibility, of individual bias, what is dropped in conversation respecting

[1] Gr. Ev. § 127, in part.

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§§ 608, 609.

them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements advanced were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all more or less interested in investigating the subject that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share.[1]

§ 609.[2] In speaking of matters of public and general interest, the terms "public" and "general" are sometimes used as synonyms, meaning merely what concerns a multitude of persons.[3] But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns *every member* of the state; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example, as a claim of highway or a right of ferry, reputation from *any one* appears to be receivable. Declarations would, indeed, be practically worthless, unless made by persons who, by living in the neighbourhood, or by frequently using the road or ferry, or the like, are shown to have had some means of knowledge. Yet the want of proof of the connexion of the declarants with the subject in question seems to affect the value only, and not the admissibility, of the evidence. If, however, the right in dispute be simply general, that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place or business would be probably altogether inadmissible.[4] *Competent knowledge in the declarant* is

[1] Wright *v.* Doe *d.* Tatham, 1837, 7 A. & E. 360, 361 (Coltman, J.); S. C. (Alderson, B.); Moorwood *v.* Wood, 1792, 14 East, 239, n.; Weeks *v.* Sparke, 1813, 1 M. & Selw. 686; Berkeley Peer., 1811, 4 Camp. 415, 416; R. *v.* Bedfordshire, 1855, 4 E. & B. 542, adopting almost the language above employed.

[2] Gr. Ev. § 128, in part.

[3] Pim *v.* Curell, 1840, 6 M. & W. 234.

[4] Crease *v.* Barrett, 1835, 4 L. J. Ex. 297. By Roman law, reputation, or common fame, seems to have been admissible in evidence in all cases: but it was not generally deemed

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§§ 609, 610.

an essential pre-requisite to the admission of his testimony; and although all the King's subjects are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required.[1]

§ 610. For example, in a dispute as to the existence of a local custom, in which all the tenants of a manor were interested, evidence of reputation would be admissible, not only from any deceased tenant, but from any deceased resident within the manor; for it might fairly be presumed that the residents, being persons conversant with the neighbourhood, would be acquainted with the local custom.[2] Therefore[3] on a question whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the Justices at the Quarter Sessions for the county, describing the castle as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to have been residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have been acquainted with the subject in dispute.[4]

sufficient proof, and, in some cases, not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis adjuvetur*. 1 Masc. de Prob., Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 19. It was held sufficient, *plena probatio*, wherever, from the nature of the case, better evidence was not attainable; *ubi à communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filiationes*. But Mascardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence —*tunc nempe non sufficeret publica vox et fama, sed una cum ipsâ deberet tractatus et nominatio probari, vel alia adminicula urgentia adhiberi*. 1 Masc. de Prob., Concl. 411, n. 1, 2, 6, 7.

[1] See infra, §§ 616 et seq.

[2] Ld. Dunraven *v.* Llewellyn, 1850, 19 L. J. Q. B. 388. See Warrick *v.* Queen's Coll., Oxford, 1871, L. R. 6 Ch. 732. The actual discussion of the subject in the neighbourhood, was a fact also relied on, in the Roman law, in cases of proof by common fame. "Quando testis vult probare aliquem scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinia hoc erat cognitum per famam, vel alio modo; et ideò iste, qui erat vicinus, potuit id scire." 2 Menoch. de Præs. lib. 6, Præs. 24, n. 17, p. 772. See, also, 1 Masc. de Prob. 389, 390, Concl. 395, n. 1, 2, 19, 9, where the law is thus laid down:— "Confines probantur per testes. Verum scias velim, testes in hâc materiâ, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiant commodum vel incommodum immediatum, possint pro suâ communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suæ universitatis, probant, dummodum præcipuum ipsi commodum non sentiant licet inferant commodum in universum."

[3] Gr. Ev. § 129, in part.

[4] D. of Newcastle *v.* Broxtowe, 1832, 4 B. & Ad. 273.

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§§ 611, 612.

§ 611. Again, on a question as to the custom of mining in a particular district, persons, under whose estates the minerals lay with respect to which the custom was said to exist, were held sufficiently connected with the subject to make their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom.[1] But where the question was, whether the city of Chester anciently formed part of the County Palatine, an old document, purporting to be a decree of certain law officers and dignitaries of the Crown, not having authority as a court, was held inadmissible as evidence of reputation, because it was not shown that the persons making it had any peculiar knowledge of the subject, excepting what they derived in the course of that one unauthorised proceeding.[2]

§ 612. If, however, the quality of the hearsay itself raises a natural inference that the persons from whom it was derived must have been specially acquainted with the locality, the courts will not require independent proof of that fact. The case just mentioned as to whether Nottingham Castle was within Broxtowe Hundred is an instance of this. Other examples are that, on a question turning on a manorial custom, depositions, purporting to have been made by copyholders in an ancient suit between a former lord and a person claiming admission to a copyhold, were admitted in evidence without proof that the persons making them were either copyholders, or were otherwise acquainted with the customs of the manor, since it must be assumed that such persons would not have been brought forward as witnesses, had they been ignorant of the subject;[3] and where an ancient unsigned customary of a manor, purporting to be *ex assensu omnium tenentium*, had been handed down with the court rolls from steward to steward, it was received as evidence to prove the course of descent within the manor.[4] Where,

[1] Crease *v.* Barrett, 1835, 4 L. J. Ex. 297.

[2] Rogers *v.* Wood, 1831, 2 B. & Ad. 245; recognised by the Ct. of Ex. in Crease *v.* Barrett, 1835, 4 L. J. Ex. 297. See, also, Evans *v.* Taylor, 1838, 7 A. & E. 617. But see Freeman *v.* Read, 1863, 32 L. J. M. C. 226.

[3] Freeman *v.* Phillipps, 1816, 4 M. & Selw. 486.

[4] Denn *v.* Spray, 1786, 1 T. R. 466. See Chapman *v.* Cowlan, 1810, 13 East, 10.

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however, to prove the boundaries of a manor, an ancient survey which purported to have been made in the time of Queen Elizabeth by a deputy surveyor appointed by the Crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, was produced from the proper custody, the court rejected it on the ground that no proof had been given that the deputy surveyor had any authority to institute the inquiry; and, stripped of this authority, he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might, it was said, have been written by any clerk idling in the office where it was found, from his own imagination, or compiled, possibly, by some interested person in furtherance of a sinister object of his own.[1]

§ 613. It may be expedient to here enumerate a few of the principal questions which have been deemed to involve matters of public or general interest, so that evidence of *reputation* (in other words, "hearsay") may be admitted, and then by way of contrast to enumerate a few of the cases which were considered of a *private* nature, so that this sort of evidence is inadmissible. On the one hand, the following will be regarded as questions of public or general interest: questions relating to a right of common existing by immemorial custom,[2] a feeding per cause de vicinage resting on a similar foundation, a parochial[4] or other district modus,[5] a manorial custom,[6] a custom of mining in a particular district,[7] a custom of a corporation to exclude foreigners from trading within a town,[8] the limits of a town,[9]

[1] Evans *v.* Taylor, 1838, 7 A. & E. 617. See, also, D. of Beaufort *v.* Smith, 1849, 19 L. J. Ex. 97; Daniel *v.* Wilkin, 1852, 21 L. J. Ex. 236. But see Freeman *v.* Read, 1863, 32 L. J. M. C. 226; Smith *v.* Ld. Brownlow, 1869, L. R. 9 Eq. 241; D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146.

[2] Weeks *v.* Sparke, 1813, 1 M. & Selw. 679, explained in Ld. Dunraven *v.* Llewellyn, 1850, 19 L. J. Q. B. 388; Evans *v.* Merthyr Tydfil Urban Council, [1899] 1 Ch. 241.

[3] Prichard *v.* Powell, 1845, 15 L. J. Q. B. 166, explained in Ld. Dunraven *v.* Llewellyn, 1850, 19 L. J. Q. B. 388.

[4] Moseley *v.* Davies, 1822, 11 Price, 162; White *v.* Lisle, 1819, 4 Madd. 214, 224; Short *v.* Lee, 1821, 4 Jac. & W. 464, 473.

[5] Rudd *v.* Wright, 1832, 1 Ph. Ev. 240.

[6] Doe *v.* Sisson, 1810, 12 East, 62.

[7] Crease *v.* Barrett, 1834, 4 L. J. Ex. 297.

[8] Davies *v.* Morgan, 1831, 1 C. & J. 587.

[9] Ireland *v.* Powell, 1802, cited Pea. Ev. 16 (Chambre, J.) and recognised (Williams, J.) in R. *v.* Bliss, 1837, 7 L. J. Q. B. 4.

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§ 613. the extent of a parish,[1] the boundary between counties, parishes, hamlets, or manors,[2] or even between a *reputed* manor (that is, an estate which from some intervening defect has ceased to be an actual manor) and the freehold of a private individual,[3] or between *old* and *new* land in a manor,[4] a claim of tolls on a public road,[5] the fact whether a road was public or private,[6] a prescriptive liability to repair sea-walls,[7] or bridges,[8] a claim of highway,[9] a right of ferry,[10] the fact whether land on a river was a public landing-place or not,[11] the existence and rights of a parochial chapelry,[12] the jurisdiction of a court, and the fact whether it was a court of record or not,[13] the existence of a manor,[14] a prescriptive right of toll on all malt brought by the west country barges to London,[15] a right by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload and deliver all oysters brought by boat for sale within the limits of the port of London,[16] a claim by the lord of a manor to all coals lying under a certain district of the manor,[17] a claim of heriot custom in respect of freehold tenements within a manor held in fee-simple,[18] a custom of electing churchwardens by a select committee,[19] and a prescriptive right to free warren as appurtenant to an entire manor.[20]

[1] R. *v.* Mytton, 1860, 29 L. J. M. C. 109.

[2] Nicholls *v.* Parker, 1811, 14 East, 331, n.; Brisco *v.* Lomax, 1838, 8 A. & E. 198; Evans *v.* Rees, 1839, 10 A. & E. 151; Plaxton *v.* Dare, 1829, 10 B. & C. 17; Thomas *v.* Jenkins, 1837, 6 A. & E. 525.

[3] Doe *v.* Sleeman, 1846, 15 L. J. Q. B. 338.

[4] Barnes *v.* Mawson, 1813, 1 M. & Selw. 81.

[5] Brett *v.* Beales, 1829, 10 B. & C. 508.

[6] R. *v.* Bliss, 1837, 7 L. J. Q. B. 4.

[7] R. *v.* Leigh, 1840, 10 A. & E. 398. The mere fact that each frontager has always repaired the sea wall in front of his land is not, in itself, sufficient evidence of a prescriptive liability to maintain the wall: Hudson *v.* Tabor, 1877, 2 Q. B. D. 290 (C. A.). And see Rundle *v.* Hearle, [1898] 2 Q. B 83.

[8] R. *v.* Sutton, 1838, 8 A. & E. 516.

[9] Crease *v.* Barrett, 1835, 4 L. J. Ex. 297; Reed *v.* Jackson, 1881, 1 East, 355.

[10] Pim *v.* Curell, 1840, 6 M. & W. 234.

[11] Drinkwater *v.* Porter, 1835, 7 C. & P. 181.

[12] Carr *v.* Mostyn, 1850, 19 L. J. Ex. 249.

[13] Goodtitle *v.* Dew, 1802, Pea. Add. Cas. 204.

[14] Steel *v.* Prickett, 1819, 2 Stark. R. 463; Curzon *v.* Lomax, 1803, 5 East, 60.

[15] City of London *v.* Clerke, 1690, Carth. 181; D. of Beaufort *v.* Smith, 1849, 19 L. J. Ex. 97.

[16] Laybourn *v.* Crisp, 1838, 4 M. & W. 320.

[17] Barnes *v.* Mawson, 1813, 1 M. & Selw. 81. In that case evidence was given of an uniform exercise of the right.

[18] Damerell *v.* Protheroe, 1847, 16 L. J. Q. B. 170.

[19] Berry *v.* Banner, 1792, Peake, R. 157.

[20] Ld. Carnarvon *v.* Villebois, 1844, 14 L. J. Ex. 233.

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§ 614. On the other hand, it has been considered that evidence of *reputation as to them must be rejected*, and that the following were mere *private* rights; namely, questions as to what usage had obtained in electing a schoolmaster to a grammar school,[1] whether the sheriff of the county of Chester, or the corporation of the city of Chester, was bound to execute criminals,[2] whether certain tenants of a manor had *prescriptive* rights of common for cattle levant and couchant,[3] what were the boundaries of a waste over which many of the tenants of a manor claimed a right of common appendant,[4] whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries,[5] whether the plaintiff was exclusive owner of the soil, or had a right of common only,[6] whether certain land in dispute had been purchased by a former occupier, or was part of an entailed estate of which he had been tenant for life,[7] what patron formerly had the right of presentation to a living,[8] whether a *farm* modus existed, and what was its nature,[9] whether a party had a private right of way over a particular field,[10] whether the tenants of a particular manor had the right of cutting and selling wood,[11] and what were the boundaries between two private estates.[12] Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of a certain farm

§ 614.

[1] Withnell *v.* Gartham, 1795, 6 T. R. 388.

[2] R. *v.* Antrobus, 1835, 2 A. & E. 793.

[3] See Ld. Dunraven *v.* Llewellyn, 1850, 19 L. J. Q. B. 388, overruling Weeks *v.* Sparke, 1813, 1 M. & Selw. 686; Williams *v.* Morgan, 1850, 15 Q. B. 782. See, also, and compare Warrick *v.* Queen's Coll., Oxford, 1871, L. R. 6 Ch. 732.

[4] Ld. Dunraven *v.* Llewellyn, 1850, 19 L. J. Q. B. 388.

[5] Talbot *v.* Lewis, 1834, 1 C. M. & R. 495. As to what constitutes "wreck" distinguished from "flotsam," see Stackpoole *v.* The Queen, 1875, Ir. R. 9 Eq. 619.

[6] Richards *v.* Bassett, 1830, 10 B. & C. 633, semble (Littledale, J.). Sed qu.

[7] Doe *v.* Thomas, 1811, 14 East, 323.

[8] Per Ld. Kenyon in R. *v.* Eriswell, 1790, 3 T. R. 721, questioning Bp. of Meath *v.* Ld. Belfield, 1748, 1 Wils. 215.

[9] Wells *v.* Jesus Coll., 1836, 7 C. & P. 284; White *v.* Lisle, 1819, 4 Madd. 214; Wright *v.* Rudd, 1832, cited 1 Ph. Ev. 172 (Ld. Lyndhurst). See, however, Webb *v.* Petts (undated), Noy, 44; Donnison *v.* Elsley, 1824, 3 Eagle & Y. 1396, n., and cases cited 1 Ph. Ev. 241, n. 2.

[10] Semble (Dampier, J.), in Weeks *v.* Sparke, 1813, 1 M. & Selw. 686; and (Ld. Kenyon), in Reed *v.* Jackson, 1800, 1 East, 355.

[11] Blackett *v.* Lowes, 1814, 2 M. & Selw. 494.

[12] Clothier *v.* Chapman, 1805, 14 East, 331. By the Roman law, evidence of reputation seems to have been deemed admissible, even in matters of private boundary. See 1 Masc. de Prob. 391, Concl. 396.

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§§ 614—616.

were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm.[1] For though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, Coleridge, J., observed that "he never heard that a fact was not to be proved in the same manner, when subsidiary, as when it was the very matter in issue."

§ 615. Evidence of reputation would on principle appear not to be admissible to prove or disprove a *private prescriptive right* or liability. Yet whether it is or not is perhaps doubtful.[2] Nevertheless, where a prescriptive right of digging stones on a lord's waste was claimed by the defendant, as annexed to his estate, and the lord offered evidence of reputation to prove that no such right existed, the court was equally divided on its admissibility.[3] On the trial, however, of an indictment against the inhabitants of a county for the non-repair of a public bridge, to which the defendant pleaded that certain persons named were liable to repair the bridge ratione tenuræ, evidence of reputation was admissible to support the plea,[4] it being considered that the fixing an individual with, or the relieving him from, such a liability as the one in question, had a necessary tendency to abridge or increase the liability of the whole neighbourhood,[5]—and, moreover, that the admissibility of evidence of reputation, when tendered to *disprove* a public liability or right, cannot be governed by a different principle from that which prevails, when such evidence is offered to *establish* the liability or right.[6]

§ 616.[7] The reason generally assigned for re ecting evidence of reputation or common fame, in matters of mere *private right* is

[1] Thomas *v.* Jenkins, 1837, 6 A. & E. 525, 529. See, also, Brisco *v.* Lomax, 1838, 3 N. & P. 308.

[2] See Prichard *v.* Powell, 1845, 15 L. J. Q. B. 166.

[3] Morewood *v.* Wood, 1792, 14 East, 327, n. Since it is difficult to see how the public could have been interested in the matter, unless it had been shown (which it was not) that the rights of the commoners were infringed by the defendant's claim, such evidence would probably at the present day be rejected. See, also, §§ 610, 611.

[4] R. *v.* Bedfordshire, 1855, 4 E. & B. 542; overruling R. *v.* Wavertree, 1841, 2 M. & Rob. 253; and confirming R. *v.* Cotton, 1813, 3 Camp. 444.

[5] See Prichard *v.* Powell, 1845, 15 L. J. Q. B. 166.

[6] See Drinkwater *v.* Porter, 1835, 7 C. & P. 181; and post, § 620. The two cases are probably explicable on the strict ground that, in the one first cited, the public were not interested in the dispute, while in the last named they were.

[7] Gr. Ev. § 137, in part.

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§§ 616, 617.

the probable *want of competent knowledge* in the declarant. "Evidence of reputation upon general points is receivable," said Lord Kenyon, "because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers to know anything of what concerns only private titles?"[1] It may not indeed on all occasions be an easy matter to distinguish between public and private rights, and some few of the cases cited above may possibly be considered to rest on somewhat doubtful reasoning. Still, the general rule of law cannot be disputed; namely, that if the matter in question be of a public or general nature,—that is, if it be interesting to the community at large, or even to a comparatively small portion of the community, such, for example, as the inhabitants of a parish, a town, or a manor,—it falls within the exception by which evidence of reputation is admitted; whereas, if it have no connexion with the exercise of any public right, or the discharge of any public duty, or with any other subject of general interest, it falls within the ordinary rule by which hearsay evidence is excluded.

§ 617.[2] The necessity for competent knowledge in the declarant may serve to explain and reconcile what is said in the books respecting the inadmissibility of *reputation* in regard to *particular facts*. Upon *general* points, as we have seen, such evidence is receivable, because of the general interest which the community have in them. But particular facts, not being equally notorious, may be misrepresented, or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained, and, therefore, evidence of reputation as to the existence of such particular facts is rejected. For instance, if the question be whether a road be public or private, declarations by old persons since dead, *that they have seen repairs done upon it*, will not be admissible;[3] neither can evidence be

[1] Morewood *v.* Wood, 1792, 14 East, 327, n.

[2] Gr. Ev. § 138, in part.

[3] Per Patteson, J., in R. *v.* Bliss, 1837, 7 L. J. Q. B. 4.

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§§ 617, 618.

received that a deceased person planted a tree near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy;[1] nor can proof of old persons having been heard to say that a stone was erected, or boys whipped, or cakes distributed, at a particular place, be received as evidence of boundary.[2] And where the question was whether a turnpike stood within the limits of a town, declarations by old people, since dead, that formerly houses stood where none any longer remained, were rejected, on the ground that these statements were evidence of a particular fact.[3] If, too, the existence and amount of a parochial modus be in issue, hearsay evidence of the payment of a specific sum in lieu of tithes by a deceased occupier will be inadmissible; though general evidence of reputation that it has always been customary to pay that sum for all the lands in the parish, will be received.[4]

§ 618. Similarly, on a question whether a certain place was parcel of a particular parish, an old book containing entries by a deceased churchwarden, not charging himself, but relating to the repairs of a chapel alleged to belong to the place in question, has been held inadmissible;[5] and so have been also entries in parish books, which recorded the fact that perambulations had taken a particular line.[6] Still, it has been usual to admit evidence of what old persons, since deceased, who accompanied those making the perambulations, have been heard to say upon such occasions;[7] because the custom of perambulating parishes having long received high judicial sanction as a legitimate mode of recording boundaries,[8]—and the fact of a perambulation

[1] R. *v.* Bliss, 1837, 7 L. J. Q. B. 4.

[2] Per Coleridge, J., in R. *v.* Bliss, 1837, 7 L. J. Q. B. 4.

[3] Ireland *v.* Powell, 1802, Pea. Ev. 16 (Chambre, J.), cited by Williams, J., in R. *v.* Bliss, 1837, 7 L. J. Q. B. 4. See also Mercer *v.* Denne, [1904] 2 Ch. at p. 513 (Farwell, J.). On the other hand, in the case last cited, evidence of reputation to show that the town extended to a certain point was received, as the limits of the town were a matter of general public interest.

[4] Harwood *v.* Sims, 1810, Wightw. 112, more fully reported and explained in Moseley *v.* Davies, 1822, 11 Price, 162, 169; Chatfield *v.* Fryer, 1815, 1 Price, 253; Garnons *v.* Barnard, 1793, 1 Anstr. 298; Wells *v.* Jesus College, 1836, 7 C. & P. 284; Deacle *v.* Hancock, 1824, McCleland, 85. See, also, Crease *v.* Barrett, 1835, 4 L. J. Ex. 297.

[5] Cooke *v.* Banks, 1826, 2 C. & P. 478.

[6] Taylor *v.* Devey, 1837, 7 A. & E. 409.

[7] Weeks *v.* Sparke, 1813, 1 M. & Selw. 687.

[8] Taylor *v.* Devey, 1837, 7 A. & E. 415.

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having taken place being considered in itself evidence of the exercise of a right,[1]—it follows that statements made by perambulators may be regarded as declarations accompanying acts, which, on grounds already explained,[2] will be admissible in evidence, provided they are not confined to particular circumstances.[3]

§ 619. It is now[4] held that proof of the exercise of the right claimed within the period of living memory is not an essential condition of the reception of evidence of reputation; though, of course, the absence of such proof, in cases where the nature of the subject admits of its production, will materially affect the value of hearsay when received.[5] Neither is it necessary that the opinions of deceased persons, which are tendered as evidence of common fame, should appear to rest on reputation derived from others, or should have been expressed in the course of a transaction relating to a question of reputation. Therefore, on an issue whether or not a lane in a certain hamlet was a common highway, a paper signed by several inhabitants of the hamlet, since dead, stating that the lane was not a highway, was received as slight evidence of reputation, although it had been drawn up at a public meeting, which had been convened for the sole purpose of considering the propriety of repairing the road, and although the opinions expressed in the document did not appear to have been founded on reputation received from others.[6]

§ 620.[7] Reputation is evidence as well *against a public right* as in its favour; and this, too, whether the evidence consist of declarations which expressly negative the right, or set up an inconsistent claim, or simply omit all mention of the right on some occasion, when a notice of it might be reasonably expected. In accordance with this principle, where the question was,

[1] Weeks *v.* Sparke, 1813, 1 M. & Selw. 687.

[2] Ante, §§ 583—588.

[3] 1 Ph. Ev. 248.

[4] Per Buller, J., in Morewood *v.* Wood, 1792, 14 East, 330, n.; Weeks *v.* Sparke, 1813, 1 M. & Selw. 688, 689, 690.

[5] Crease *v.* Barrett, 1835, 4 L. J. Ex. 297; Ld. Dunraven *v.* Llewellyn, 1850, 15 Q. B. 791, 809; R. *v.* Sutton, 1838, 8 A. & E. 516; Curzon *v.* Lomax, 1803, 5 Esp. 60; Steel *v.* Prickett, 1819, 2 Stark. R. 466; Roe *v.* Parker, 1792, 5 T. R. 32 (Grose, J.).

[6] Barraclough *v.* Johnson, 1838, 8 A. & E. 99, 108.

[7] Gr. Ev. § 140, in part.

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§§ 620, 621.

whether a landing-place was public or private property, the declarations of ancient deceased persons, that it was the private landing-place of the party and his ancestors, have been held admissible;[1] and where, to negative the existence of a particular manorial custom, an ancient deed, made between the lord of the manor and a great many of the copyholders, in which the latter claimed, and the former admitted and confirmed, what they mutually conceived to be the immemorial customs of the manor, and in which all mention of the particular custom in question was omitted, was considered evidence of reputation showing that the right claimed did not exist at that day, and that the subsequent usage relied upon in support of it was referable to usurpation, and not to right.[2]

§ 621.[3] It will have been seen from several of the cases cited in this chapter, that oral declarations are not the sole medium of proving traditionary reputation in matters of public and general interest. Indeed, the principle which makes evidence of reputation admissible at all, applies not only to oral proof but equally to documentary evidence, and to all other kinds of proof denominated hearsay, so that deeds,[4] leases,[5] and other private documents are admissible, as declaratory of the public matters recited in them. Even copies and abstracts of old deeds and wills[6] have occasionally been used for the same purpose. But these are not *in themselves* evidence of reputation, but merely admissible as secondary evidence of the original instruments. Consequently, in strictness, no such document can be received, without some proof being furnished of the former existence and present loss of the originals.[7]

[1] Drinkwater *v.* Porter, 1835, 7 C. & P. 181.

[2] M. of Anglesey *v.* Ld. Hatherton, 1842, 12 L. J. Ex. 57, in which any actual decision as to fact cited in the text became, however, unnecessary. See D. of Portland *v.* Hill, 1866, L. R. 2 Eq. 765.

[3] Gr. Ev. § 139, in part.

[4] Curzon *v.* Lomax, 1803, 5 Esp. 60; Brett *v.* Beales, 1829, M. & M. 416.

[5] Plaxton *v.* Dare, 1829, 10 B. & C. 17; Barnes *v.* Mawson, 1813, 1 M. & Selw. 78; M. of Anglesey *v.* Ld. Hatherton, 1842, 12 L. J. Ex. 57; D. of Beaufort *v.* Smith, 1849, 19 L. J. Ex. 97.

[6] See Shrewsbury Peer., 1857, 7 H. L. C. 1; Braye Peer., 1836-9, 6 Cl. & Fin. 757 (H. L.).

[7] See and compare Doe *v.* Skinner, 1848, 18 L. J. Ex. 107; Doe *v.* Wittcomb, 1853, 4 H. L. C. 425; Perth Peer., 1846-8, 2 H. L. C. 265; and D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146.

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§ 622. *Maps*, showing the boundaries of counties, towns, parishes, or manors, which are not proved to have been prepared by persons who were either deputed to make them by some one interested in the question, or who themselves had apparently some personal knowledge on the subject, or who are shown to have been in some way connected with the district, cannot be received as evidence whatever their age or apparent accuracy may be.[1] But if proof be forthcoming that they have been either made or recognised by persons having adequate knowledge, they would seem, on principle, to be valid evidence of reputation. Accordingly, where upon the trial of an indictment against a parish for the non-repair of a highway, to show that the road in question was not within the parish, a map was produced which had been made some thirty years before by a surveyor, from information derived from an old parishioner, who had pointed out to him the boundaries, it was held, that, if proof could be given of the old man's death, the map would be admissible as evidence of reputation, though it came from the chest of the parish indicted.[2] So, too, a township map produced from the proper custody and made by a deceased surveyor, who was conversant with the locus in quo, which map had been recognised by the parish authorities for rating purposes, was admitted in evidence upon an issue raising a question of public or general right in a part of the township,[3] and a tithe map is admissible on a similar issue.[4] A map made under the authority of the sovereign's commission, adopted in the presentment of a jury acting under that commission, and acted on for nearly sixty years, is, too, evidence of the limits of a sewer's level.[5] On another occasion, also, maps appear to have been received merely as public documents;[6] but in an older case, where, in order to prove that the locus in quo was a highway, a copper-plate map, purporting on its face to have been taken by the direction of former

§ 622.

[1] Hammond *v.* Bradstreet, 1854, 23 L. J. Ex. 332. See Pipe *v.* Fulcher, 1858, 28 L. J. Q. B. 12.

[2] R. *v.* Milton, 1843, 1 C. & K. 58.

[3] Smith *v.* Lister, 1895, 64 L. J. Q. B. 154.

[4] Id.

[5] New Romney (Mayor) *v.* New Romney (Commissioners of Sewers), [1892] 1 Q. B. 840.

[6] Alcock *v.* Cook, 1829, 1 Ph. Ev. 251, n. 1. This is evidently the case on which Tindal, C.J., acted in the one referred to in 2 Ph. Ev. 216, n. (*e*).

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§§ 622—624.

churchwardens, which it was proposed to prove was generally received by the parish as authentic, was rejected with the observation, that "it would be equally improper to admit it, as to admit a plan taken by the lord of the manor, who might thereby crush and destroy the estate of his tenants."[1] The decision is of the less authority, however, because it does not appear from the report that the map was an ancient one, or that the churchwardens, by whose direction it was drawn, were dead.

§ 623. Again, copies of court rolls, and especially presentments in manor courts,[2] stating the customs or boundaries of a manor, depositions of conventionary tenants of a manor, taken in an authorised inquiry, and representing the rights of the lord,[3] and other similar documents, are admissible as evidence of reputation;[4] though unless it can be satisfactorily proved, or at least reasonably inferred, that the proceedings were conducted in a legal and regular manner, it will seldom be prudent to run the risk of a new trial by tendering such evidence.[5]

§ 624. *Verdicts* of juries, and *judgments, decrees, and orders* of courts of competent jurisdiction, are not now[6] admissible as being actual evidence of reputation.[7] Nevertheless, these documents, though not reputation, are as good evidence as reputation;[8] and (whatever be the principle on which they are admitted) the rule has been established by too many authorities to be now questioned,[9] that, in all cases, involving matters of public or general interest, wherein reputation is evidence, a verdict or a judgment upon the matter directly in issue, though pronounced in a cause litigated between strangers to the parties on the record, is also

[1] Pollard *v.* Scott, 1790, Peake, R. 19.

[2] Evans *v.* Rees, 1839, 10 A. & E. 151; Roe *v.* Parker, 1793, 5 T. R. 26; Arundell *v.* Ld. Falmouth, 1814, 2 M. & Selw. 441; Damerell *v.* Protheroe, 1847, 16 L. J. Q. B. 170.

[3] Crease *v.* Barrett, 1835, 4 L. J. Ex. 297; Freeman *v.* Phillipps, 1816, 4 M. & Selw. 486; Gee *v.* Ward, 1857, 7 E. & B. 509.

[4] See Evans *v.* Taylor, 1838, 7 A. & E. 617, as explained in D. of Beaufort *v.* Smith, 1849, 19 L. J. Ex. 97; Daniel *v.* Wilkin, 1852, 21 L. J. Ex. 236.

[5] See R. *v.* Leigh, 1839, 10 A. & E. 398.

[6] Pim *v.* Curell, 1840, 6 M. & W. 234.

[7] Formerly they were admissible; the doctrine that they were so having, as regards verdicts, taken its rise from the days when juries were summoned *de vicineto*. Evans *v.* Rees, 1839, 10 A. & E. 153; Brisco *v.* Lomax, 1839, 8 A. & E. 212.

[8] Brisco *v.* Lomax, 1839, 8 A. & E. 211.

[9] Evans *v.* Rees, 1839, 10 A. & E. 156.

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§§ 624, 625.

admissible; not as tending to prove *any specific fact existing at the time*, but as evidence of the most solemn kind, of an adjudication by a competent tribunal upon the state of facts and the question of usage at the time.[1] For example, where a public right of way was in question, the plaintiff was allowed to show a verdict, rendered in his own favour against a defendant in another suit, in which the same right of way was in issue.[2] It matters not as to the admissibility (though it may as to the weight) of such evidence whether the judgment has been suffered by default, or though of a very recent date, is not supported by any proof of execution or of the payment of damages,[3] or even that the verdict, where one has been obtained, has not been followed up by any judgment or decree.[4] Neither is it material whether the verdict be one at Nisi Prius, or be the finding of a jury summoned under a commission from a Duchy court, or any other special commission. It must, however, be proved, or be inferred from the circumstances, that the inquiry was a lawful one.[5]

§ 625. If, when the record is produced, a direct issue appears to have been raised on the right or custom in controversy, the opponent will not be entitled to show that in fact no evidence was given on that issue; since the record is conclusive of the fact of such a finding, though not of its truth as between other parties.[6] If the record contains no direct issue on the custom, the party producing it must furnish some evidence to show that the custom was really in question; for, otherwise, the mere verdict would prove nothing.[7] In an action by the lord of a manor against a copyholder for trespassing on his free warren, an ancient judgment on a quo warranto information filed by the Attorney-General against a former lord, in which the defendant pleaded, and the Attorney-General confessed, a prescriptive title to the free warren as appurtenant to the manor, was received in

[1] Pim *v.* Curell, 1840, 6 M. & W. 266; D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146; Neill *v.* D. of Devonshire, 1882, 8 App. Cas. 147 (H. L.).

[2] Reed *v.* Jackson, 1801, 1 East, 355. See Petrie *v.* Nuttall, 1856, 25 L. J. Ex. 2[1] 0.

[3] Ld. Carnarvon *v.* Villebois, 1844, 14 L. J. Ex. 233. See R. *v.* Brightside Bierlow, 1849, 19 L. J. M. C. 50.

[4] Brisco *v.* Lomax, 1838, 8 A. & E. 198.

[5] Id.

[6] Reed *v.* Jackson, 1801, 1 East, 355.

[7] Laybourn *v.* Crisp, 1838, 4 M. & W. 320.

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§§ 625—627. evidence for the plaintiff, as being the judgment of a competent court upon a matter of a public nature, which concerned the Crown and the subject, and being "admissible on the same footing as an allowance before the Justices of Eyre, an inquisition post mortem, or an inquisition issuing out of the Court of Exchequer to ascertain the extent of the Crown lands."[1]

§ 626. Decrees and orders of all competent tribunals stand upon the same footing as verdicts.[2] Therefore, orders of the commissioners of sewers requiring landowners to repair sea-walls, will, on an issue respecting the liability of a party to make such repairs, be evidence as adjudications by a court of competent jurisdiction; and, if they are of an ancient date, it will be presumed that they have been duly executed and acted upon.[3] To render decrees of the old Cour of Chancery admissible, it is unnecessary to put in the depositions to which they refer; because, in equity, the judge must have collected the questions in dispute from the bill and answer only.[4] Still, a decree, to be evidence, must be *final;* and mere *interlocutory orders*, not involving any judgment upon the rights of the parties, cannot be received.[5]

§ 626A. So anxious, however, are the courts to confine this species of evidence within strict limits, that they have rejected an award in a suit inter alios, though the cause was referred by order of the judge at Nisi Prius.[6]

§ 626B. No mere *claim* to the possession of lands, not followed by judgment, will be admissible in evidence,[7] nor can any verdict, judgment, decree, or order, be received, if it appear that the parties pronouncing it were acting without legal authority.[8]

§ 627. Judgments and decrees must in general be proved

[1] Earl of Carnarvon *v.* Villebois, 1844, 14 L. J. Ex. 33.

[2] See Laybourn *v.* Crisp, 1838, 4 M. & W. 320; D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146.

[3] R. *v.* Leigh, 1839, 10 A. & E. 398; D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146.

[4] Laybourn *v.* Crisp, 1838, 4 M. & W. 320. It seems that the depositions may be read by the opposite party as *his* evidence: id.

[5] Pim *v.* Curell, 1840, 6 M. & W. 234.

[6] Evans *v.* Rees, 1839, 10 A. & E. 151; R. *v.* Cotton, 1813, 3 Camp. 444; Wenman *v.* Mackenzie, 1855, 25 L. J. Q. B. 44.

[7] D. of Devonshire *v.* Neill, 1876-7, 2 Ir. L. R. 132, 146.

[8] Rogers *v.* Wood, 1831, 2 B. & Ad. 245.

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either by producing the originals, or by examined, or now by office,[1] copies. Occasionally, however, a copy of a less authentic character than those named will be received, if it has been dealt with by the party against whom it is tendered, or by those through whom he claims, either as an authentic copy (in which case it will be admissible as secondary evidence) or as a paper containing a true statement of the custom or other subject-matter of reputation in dispute (in which case it will be received as primary proof). For instance,[2] where the question at issue turned on the existence or non-existence of a particular manorial custom, a copy of an old decree of the Court of Chancery in a suit between a copyholder and the ord, establishing the custom, was allowed to be read as secondary evidence of the decree, it being held that, inasmuch as it had been found among the papers of a former deceased lord, that fact furnished some evidence of its having been recognised as a true copy, proof having first been given of an ineffectual search for the original. The court, however, pointed out that it was inadmissible as primary evidence, since the mere circumstance of its having been deposited among the papers of the deceased lord was not such a dealing with it as to be equivalent to an admission, upon the lord's part, that it contained a true account of the customs of the manor. A second document tendered in evidence in the same case was an office copy[3] of another decree, and as there was some evidence to show that this had been given to a witness by the lord as proof of the customs of the manor, the court regarded it in the light of an admission, and held it admissible as primary evidence of those customs.

§ 628.[4] The doctrine that declarations of deceased persons as to matters of public interest are an exception to the general rule, that hearsay evidence is inadmissible, is subject to important qualification, which is, that such *declarations, to be admissible as evidence of reputation, must have been made before any controversy arose touching the matter to which they relate;* or, as it is usually expressed, *ante litem motam.* The ground on which the

[1] R. S. C. 1883, Ord. XXXVII. r. 4, cited post, § 1538.
[2] Price *v.* Woodhouse, 1849, 18 L. J. Ex. 271.
[3] See post, § 1538.
[4] Gr. Ev. § 131, in part.

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§§ 628, 629. declarations of deceased persons are admitted at all, is, that they are the natural effusions of a party who is presumed to know the real facts, and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.[1] But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment; and, if they are disposed to speak the truth, facts are often seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all ex parte declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy.[2] As the doctrine that declarations cannot be received unless made ante litem motam, is not confined to matters of public and general interest, but equally governs the admissibility of hearsay evidence in matters of pedigree, it will be convenient to illustrate its operation by referring indiscriminately to both these classes of cases.

§ 629.[3] This rule was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to any earlier period of the dispute.[4] But in our law the term *lis* is taken in the classical[5] and larger sense of *controversy;* and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit.[6] It is now decided that, to render declarations inadmissible as *post litem motam* at the time when they are made, "there must be, not merely facts which may lead to a dispute, but a *lis mota*, or suit, or controversy preparatory to a

[1] Per Ld. Eldon, in Whitelocke *v.* Baker, 1807, 13 Ves. 514; R. *v.* Cotton, 1813, 3 Camp. 444.

[2] Berkeley Peer., 1811, 4 Camp. 401, 409, 413 (JJ. in H. L.); Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161; Richards *v.* Bassett, 1830, 10 B. & C. 633.

[3] Gr. Ev. § 131, in part.

[4] *Lis est, ut primum in jus, vel in judicium ventum est; antequam in judicium veniatur, controversia est, non lis:* Cujac. Op. Post. tom. 5, col. 193, B. and col. 162, D. *Lis inchoata est ordinata per libellum, et satisdationem, licet non sit lis contesta:* Corpus Juris Glossatum, tom. 1. col. 553, ad Dig. lib. iv. tit. 6, l. 12. *Lis mota censetur, etiamsi solus actor egerit:* Calv. Lex., Verb. Lis mota.

[5] "Philosophi ætatum in litibus conterunt."—Cic.; cited (Lawrence, J.) in Berkeley Peer., 1811, 4 Camp. 401, 411 (JJ. in H. L.).

[6] Per Sir J. Mansfield, in Berkeley Peer., 1811, 4 Camp. 417 (JJ. in H. L.); Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161.

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suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject-matter which constitutes the question in litigation."[1]

§ 630. From the explanation of *lis mota* given above, three propositions follow. The first proposition is, that declarations will not be rejected, in consequence of their having been made *with the express view of preventing disputes*; and it is exemplified by the judges having unanimously held, in conformity with an earlier opinion expressed by Lord Mansfield,[2] that an entry made by a father in any book, for the express purpose of establishing the legitimacy of his son at the time of his birth, in case the same should be called in question, will be receivable in evidence, notwithstanding the professed view with which it was made,[3] a doctrine which has since been sanctioned by Lords Brougham[4] and Cottenham in England,[5] and by Lord St. Leonards in Ireland,[6] and may therefore now be considered as established law in both countries. The second proposition is, that declarations are admissible, if no dispute had arisen when they were made, though they were made in *direct support of the title of the claimant*.[7] For although a feeling of interest will often cast suspicion on declarations, it has never been held to render them inadmissible. The third proposition is, that the mere fact of the declarant having stood, or thought that he stood, *in pari jure* with the party relying on the declaration, will not render such declaration inadmissible. One peerage case, indeed, appears at first sight to throw some doubt upon the

[1] Davies *v.* Lowndes, 1843, 12 L. J. C. P. 506; Shedden *v.* Att.-Gen. and Patrick, 1861, 30 L. J. P. & M. 217; Berkeley Peer., 1811, 4 Camp. 401 (JJ. in H. L.); Slaney *v.* Wade, 1836, 1 My. & Cr. 338, 356. See Butler *v.* Mountgarret, 1859, 7 H. L. C. 633; Frederick *v.* Att.-Gen., 1874, L. R. 3 P. & D. 270.

[2] Goodright *v.* Moss, 1777, 2 Cowp. 591. The commencement of the controversy was, at one time, further defined by Alderson, B., to be "the arising of that state of facts on which the claim is founded, without anything more": Walker *v.* Beauchamp, 1834, 6 C. & P. 552. But this dictum,—though afterwards upheld by Ld. Cottenham (Davies *v.* Lowndes, 1843, 12 L. J. C. P. 506)—has since been overruled: Shedden *v.* Att.-Gen. and Patrick, 1861, 30 L. J. P. & M. 217; Reilly *v.* Fitzgerald, 1843, 6 Ir. Eq. R. 335.

[3] 4 Camp. 418.

[4] Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161.

[5] Slaney *v.* Wade, 1836, 1 My. & C. 338.

[6] Reilly *v.* Fitzgerald, 1843, 6 Ir. Eq. R. 335.

[7] The leading authority supporting this proposition is Doe *v.* Davies, 1847, 16 L. J. Q. B. 218, whence the remark in the text is taken.

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§§ 630—632.

subject;[1] but it is highly probable that the pedigree was there rejected, not as having been made by a party while standing in the same situation as the claimant, but as having been concocted by such person in direct contemplation of himself laying claim to the dignity.

§ 631. Even if the peerage case just referred to be not susceptible of this explanation, a single isolated decision can scarcely controvert a rule of law, which has been sanctioned and acted upon by numerous judges,[2] and which is so founded on reason that a contrary doctrine would go far towards excluding all evidence of reputation. For instance, in cases of public and general interest, if the circumstance that the declarant stood, or believed he stood, *in pari jure* with the person relying on the declaration were a ground for rejecting the evidence afforded by such declaration, it would be glaringly inconsistent with the rule, which requires the statement to have been made by some person having competent knowledge o the subject.[3] In cases of pedigree, too, though the result of excluding declarations of persons *in pari jure* would not be equally mischievous, it would frequently have the effect of drying up sources of information which would be highly valuable in the investigation of truth. The circumstances assumed in each one of the cases just supposed may indeed render it very possible that the declarant may have had some secret wish or bias, which may have induced him to make a statement either partially or totally false; but the same observation might apply to all evidence of this nature, and its weight in each particular case must be determined by the jury.

§ 632.[4] So much of the rule under consideration as declares that a declaration shall be rejected as having been made *post litem motam* only when the controversy relates to the very same subject-matter as is in question in the litigation in which the

[1] Zouch Peer., 1807, Parl. Min. 207 (H. L.).

[2] Moseley *v.* Davies, 1822, 11 Price, 162; Harwood *v.* Sims, 1810, Wightw. 112; Deacle *v.* Hancock, 1824, McCleland, 85; Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161; Freeman *v.* Phillipps, 1816, 4 M. & Selw. 486, cited with approbation (Ld. Lyndhurst, C.B.) in Davies *v.* Morgan, 1831, 1 C. & J. 587; Nicholls *v.* Parker, 1805, 14 East, 331, n.; Doe *v.* Tarver, 1824, Ry. & M. 141.

[3] Ante, §§ 610, 611.

[4] Gr. Ev. § 132, in part.

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declaration is offered as evidence, is based on sound sense. For, the mere discussion of other topics, however similar they may be in their general nature to the real matter in dispute, does not necessarily lead to the inference that that matter was controverted. The reasonableness of the rule is shown by the following illustration:—In a suit between a copyholder and his lord, where the point in issue is, whether a certain customary fine is to be assessed by the jury of the lord's court, depositions taken in an ancient suit against a former lord, where the controversy turned on the *amount* of such fine, in which depositions the fine was mentioned as assessable by the lord, are plainly admissible as evidence to negative the existence of any custom for the jury to interfere. As one of the learned judges observed in that case, "where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*."[2] §§ 632, 633.

§ 633. It is not, however, necessary that the former controversy should have been between the same parties, or should have related to the same property or claim, provided it appears that the matters, respecting which the declarations offered in evidence on the second trial were made, were really under discussion in the former dispute. Consequently where in a peerage case the question before the Committee of Privileges had regard to the legitimacy of the claimant, and this turned on the fact whether his parents (who had certainly gone through the ceremony of a marriage after his birth, and had subsequently had several children) had been privately married two years before he was born;—a deposition of the father, wherein he swore positively to the fact of the first marriage, taken some years before, in a suit instituted by the claimant and three of his brothers born before the second marriage against the other children born after that event, for the purpose of perpetuating the testimony of the legitimacy of the former, who claimed in that character to be entitled in remainder to an estate then held by the father, was rejected.[3] So, in another peerage case, where the claimant was required to prove that his parents were legally married, declarations contained in the will of

[1] Freeman *v.* Phillipps, 1816, 4 M. & Selw. 486.

[2] Id. (Bayley, J.) See, also, Gee *v.* Ward, 1857, 7 E. & B. 509; D. of Devonshire *v.* Neill, 1877, 2 Ir. L. R. 132, 146.

[3] Berkeley Peerage case, 1811, 4 Camp. 415 (JJ. in H. L.).

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§§ 633, 634.

one of the parents, affirming most solemnly the fact of marriage, as also statements to the same effect made by him in conversation, were rejected, since it appeared that some years previously to such declarations and statements being made, a suit had been instituted by the Crown to annul the marriage, and it was not shown (as in truth it could not be) that that marriage, then disputed, was not the very marriage relied on by the present claimant.[1]

§ 634. Declarations, made after the controversy has originated, are in all events to be excluded, even though proof be offered that the *existence of the controversy was not known* to the declarant.[2] This is justified on the ground not only that whether the declarant knew of the existence of the previous litigation, raises a collateral issue, and that such prior litigation may have been instituted fraudulently, but on the further ground that, "If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced."[3]

[1] See Sussex Peerage Case, 1844 (H. L.), as reported 11 Cl. & Fin. 85, 99—103.

[2] Shedden *v.* Att.-Gen. and Patrick, 1861, 30 L. J. P. & M. 217.

[3] Berkeley Peer., 1811, 4 Camp. 417 (Sir J. Mansfield, in H. L.).

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CHAPTER IV.

MATTERS OF PEDIGREE.

§ 635. It has been pointed out[1] that while, as a general rule, hearsay evidence is not admitted, there are *six* exceptions to this general rule. Evidence as to matters of pedigree forms the *second* exception to such general rule. This exception rests on the ground of necessity. For example, in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known but to few persons. Courts of law, have, consequently, so far relaxed these rules in matters of pedigree,[2] as to allow parties to have recourse to traditional evidence; often the sole species of proof which can be obtained. The Probate Division will even grant probate to the estate of a person whose Christian name is not known, but who is proved by admissible declarations of members of the family to have had an existence.[3] It was, indeed, long doubtful whether the declarations of servants, friends, and neighbours, might not be received. But the settled rule is that the admission of hearsay is restricted to hearsay proceeding from persons who were *de jure related by blood or marriage* to the family in question, and who may, consequently, be supposed to have had the greatest interest in seeking, the best opportunity for obtaining, and the least reason for falsifying, information on the subject.[4] § 635.

[1] Ante, § 607.

[2] As to the burthen of proof in matters of pedigree, see In re Perton, Pearson *v.* Att.-Gen., 1885, 53 L. T. 707.

[3] Re Goods of Thompson, 1887, 12 P. D. 100.

[4] Johnson *v.* Lawson, 1824, 2 Bing. 86; Crease *v.* Barrett, 1835, 4 L. J. Ex. 297; Vowles *v.* Young, 1806, 13 Ves. 147 (Ld. Erskine); Goodright *v.* Moss, 1777, 2 Cowp. 591, as explained by Ld. Eldon in Whitelocke *v.* Baker, 1807, 13 Ves. 514; Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 159; Stafford Peer., 1825, Parl. Min. 4 (H. L.); Jewell *v.* Jewell, 1843, 1 Howard, Sup. Ct. R. 231 (Am.); Jackson *v.* Browner, 1820, 18 Johns. 37 (Am.); Chapman *v.* Chapman, 1817, 2 Conn. 347 (Am.); Waldron *v.* Tuttle, 1828, 4 New Hamp. 371 (Am.).

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§§ 636, 637.

§ 636. So far as blood relations are concerned, no limitation in the rule has ever been recognised.[1] And with regard to relationship by affinity, not only are declarations by a husband respecting his wife's family[2] admissible, but so also are now the wife's declarations concerning her husband's relatives.[3] But statements made by the wife's *relatives*—even, for instance, her father—are not.[4] Moreover, the rule does not apply at all as between *illegitimate* members of a family. Therefore, an assertion by a man that one of his natural brothers had died without issue must be rejected;[5] as also must a declaration by one brother that another brother has had an illegitimate son.[6]

§ 637. Whether, under any circumstances, the declarations of a person deceased, asserting his own illegitimacy, can be received is doubtful. Such declarations, however, can always be received as admissions against himself and those who claim under him by some title derived subsequently to the statements being made.[7]

[1] Davies *v.* Lowndes, 1843, 12 L. J. C. P. 506 (Parke, B.); Shrewsbury Peer., 1857, 7 H. L. C. 23.

[2] Overruling dictum in Davies *v.* Lowndes, 1843, 7 Scott, N. R. 188 (Parke, B.).

[3] Shrewsbury Peer., 1857, 7 H. L. C. 1 (H. L.).

[4] Id.

[5] Doe *v.* Barton, 1827, 2 M. & Rob. 28. See Doe *v.* Davies, 1847, 16 L. J. Q. B. 218.

[6] Crispin *v.* Doglioni, 1863, 32 L. J. P. & M. 109. See, however, contrà, Cooke *v.* Lloyd, 1803, Peake, Ev. Appendix XXVIII., infra, in note [7]. See, also, Hitchins *v.* Eardley, 1871, L. R. 2 P. & D. 248.

[7] See R. *v.* Rishworth, 1842, 11 L. J. M. C. 34; and Proc.-Gen. *v.* Williams, 1861, 31 L. J. P. & M. 157; S. C. nom. Dyke *v.* Williams, In re Mary Emsley, 1862, 2 S. & T. 491. In Cooke *v.* Lloyd, 1803, Peake, Ev. Appendix XXVIII. (Le Blanc, J.), the question was whether an elder son, who had taken possession of the paternal estates, and conveyed them to one of the litigants, was born in wedlock. After such elder son's death, his own declaration that he was a bastard was received in evidence (Le Blanc, J.), though made subsequently to the conveyance, "as the representation of one of the family of the degree of relationship he bore to it." If the cases cited in the text be law,—as they would probably be deemed at the present day,—this decision can scarcely rest upon that ground, unless the special circumstances of the case be prayed in aid; and unless it can successfully be contended, that, since the defendant's claim rested on the legitimacy of the vendor, he could not object to the vendor's declaration, without relinquishing the only prop of his title. Should this refined argument be deemed inconclusive, perhaps the admissibility of the declaration might be sustained, on the ground that the cause turned, not only on the condition of the father's family, but on the actual status of the declarant himself; but here we are met by the difficulty, that the son could only have known the fact of his own illegitimacy by information received from others; and, as a bastard has in the eye of the law no relatives, the hearsay must have been derived from strangers, and its admissibility might on that ground be questioned. See further remarks on this case, infra, in text. Moreover, in one case evidence was received that the father had specified the time of his marriage,

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§§ 637—639.

Declarations of a parent that a child is illegitimate are admissible after such parent's death,[1] notwithstanding the rule of law, which possibly still[2] precludes parents from giving testimony to bastardise issue born during wedlock.[3] Possibly, however, after previous proof of a valid marriage they are inadmissible.[4]

§ 638. If a man has once been connected with a family by marriage, the death of his wife will not dissolve that connexion, so as to render inadmissible declarations subsequently made by him. Therefore where, in a case of pedigree, a witness was asked whether he had not heard a husband, since deceased, state, after his wife's death, that she was illegitimate, the answer was received.[5] The court *presumed* that the knowledge must have been obtained by the husband whilst he was a member of the family.[6]

§ 639. Again, no valid objection can be taken to evidence of tradition as to family history, on the ground that it is *hearsay upon hearsay*, provided all the declarations come from different members of the same family, or do not directly appear to have been derived from strangers.[7] For example, the declarations of a deceased widow respecting a statement which her husband had made to her, as to who his cousins were, or the declaration of a relative, in which he asserts generally that he has *heard* what he

had declared his eldest son to have been born before that date, had heaped upon him opprobrious epithets implying illegitimacy, and had on his death-bed pointed to his younger son as his heir; and these declarations would seem to have been clearly admissible, if not as directly proving the bastardy of a person, who, though de facto his son, was de jure a stranger to him, at least as showing the position of the legitimate portion of his family, through whom the plaintiff claimed his title. See Goodright *v.* Moss, 1777, 2 Cowp. 593; Murray *v.* Milner, 1879, 12 Ch. D. 849. See, also, In re Perton, Pearson *v.* Att.-Gen., 1885, 53 L. T. 707.

[1] See In re Perton, Pearson *v.* Att.-Gen., 1885, 11 App. Cas. 1; Aylesford Peer., 1885 (H. L.); Powlett Peer, [1903] A. C. 398.

[2] See post, § 950.

[3] R. *v.* Stourton, 1836, 5 A. & E. 180.

[4] Murray *v.* Milner, 1879, supra (Fry, J.). Whether such a rule of law still exists is very doubtful, it certainly does not prevent a husband from giving evidence that he did not have intercourse with his wife before marriage, although the effect of such evidence is to bastardise a child born after the marriage. See also Gordon *v.* Gordon & Granville Gordon, [1903] P. 141 (Jeune, P.); Gordon *v.* Gordon & Bell, [1903] P. 92 (Jeune, P.), and post, § 950.

[5] Vowles *v.* Young, 1806, 13 Ves. 140; Doe *v.* Harvey, 1825, Ry. & M. 297. But see observations in last section.

[6] Johnson *v.* Lawson, 1824, 2 Bing. 92.

[7] Shedden *v.* Att.-Gen. and Patrick 1861, 30 L. J. P. & M. 217.

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§§ 639, 640.

states, are both receivable; and even *general repute in the family*, proved by the testimony of a surviving member of it, has been considered as falling within the rule.[1] Moreover, it is not necessary to show that the declarations were contemporaneous with the events to which they relate.[2]

§ 640. Before, however, a declaration can be admitted in evidence, the *relationship of the declarant* with the family *must be established* by some proof *other than the declaration* itself.[3] In tracing ancient pedigrees, the court would probably be satisfied with slight evidence on this head, since the connexion of the declarant with the family might be equally difficult of proof with the very fact in controversy. But some evidence would certainly be required even here. Otherwise, a stranger, by claiming alliance with a family, and then making statements respecting it, might assume to himself the power, after death, of materially altering the relative rights of its several branches.[4] It seems, however, unnecessary to show the exact degree of relationship that subsists between the declarant and the person respecting whom the declarations are tendered, but it will be sufficient to prove that they were in some manner connected by blood or marriage;[5] and if the question be whether any, or what, relationship

[1] Doe *v.* Griffin, 1812, 15 East, 293; Shedden *v.* Att.-Gen. and Patrick, 1861, 30 L. J. P. & M. 217. If this were not so, the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge: Doe *v.* Randall, 1828, 2 M. & P. 20; Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161; Slaney *v.* Wade, 1836, 1 My. & C. 338. See Robson *v.* Att.-Gen., 1843, 10 Cl. & F. 500 (H. L.), and Davies *v.* Lowndes, 1843, 7 Scott, N. R. 214. See post, §§ 655, 656.

[2] Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 165; Lovatt Peerage, 1826—57, Parl. Min. 89 (H. L.). As Ld. Brougham has well observed, such a restriction "would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence;" and, to use a homely illustration,—it would even render inadmissible the statement of a deceased person as to the maiden name of his own grandmother.

[3] Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 165; Banbury Peer., 1809, Selwyn's Nisi Prius, 748—750 (H. L.); Ld. Eldon in Berkeley Peer., 1811, 4 Camp. 419 (H. L.); Leigh Peer., 1828—29, Parl. Min. 307. H. L.; Stafford Peer., 1825, Parl. Min. 4 (H. L.); R. *v.* All Saints, 1828, 7 B. & C. 789; Davies *v.* Morgan, 1831, 1 C. & J. 587 (Id.); Att.-Gen. *v.* Köhler, 1861, 9 H. L. C. 660 (H. L.); Plant *v.* Taylor, 1863, 7 H. & N. 211; Dyke *v.* Williams, In re Mary Emsley, 1862, 2 S. & T. 491.

[4] See Doe *v.* Randall, 1828, 2 M. & P. 24.

[5] See Vowles *v.* Young, 1806, 13 Ves. 147.

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§§ 640—642.

subsists between two supposed branches of the same family, it is only necessary to establish the connexion of the declarant with either branch.[1] It has, indeed, been urged, that proof must be given connecting the declarant with both branches; but if this were necessary the declarations would be superfluous, as merely tending to prove a connexion, which, by proof showing that the declarant was related to both branches, had already been established.[2]

§ 641. Though the ground upon which hearsay evidence is admitted in cases of pedigree is, technically, because it is presumed that no better evidence can be procured, yet such evidence will not be rejected, though living witnesses might have been called to prove the very facts to which it relates.[3] For example, the declarations of a deceased mother, as to the time of the birth of her son, may be received, though the father be living and not called.[4] Where, however, the declarant himself is alive, and capable of being examined, his declarations will be rejected.[5] Consequently, it lies upon the party, who seeks to avail himself of this species of evidence, to prove the declarant's death. Thus, where, to establish a Scotch marriage, a relative of the supposed husband had been asked at the trial what she had heard on the subject from "members of the family," the answer was rejected, on the ground that the question had not been limited to statements made by *deceased* relatives.[6] Moreover, as pointed out in the last chapter, even in matters of pedigree, hearsay declarations made *post litem motam* are not receivable.[7]

§ 642.[8] The term *pedigree* embraces not only general questions of descent and relationship, but also the particular facts of *birth*, *marriage*, and *death*, and the *times*[9] when, either absolutely or relatively, these events happened, provided such facts are required to be proved for some genealogical purpose.[10] All these

[1] Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161. See Smith *v.* Tebbitt, 1867, L. R. 1 P. & D. 398, 434.

[2] Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161.

[3] Ph. Ev. 212.

[4] R. *v.* Birmingham (undated), Hubb. Ev. of Succ. 660.

[5] Pendrell *v.* Pendrell, 1731, 2 Str. 924.

[6] Butler *v.* Mountgarret, 1859, 7 H. L. C. 646.

[7] Ante, §§ 628—634; Butler *v.* Mountgarret, 1859, 7 H. L. C. 646.

[8] Gr. Ev. 104, as to first four lines, in part.

[9] Betty *v.* Nail, 1856, 6 Ir. C. L. R. 17.

[10] As to this proviso, see post, § 645.

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§§ 642, 643. facts, therefore, may, in any genealogical inquiry, be established by hearsay derived from relatives, though, with respect to specific dates, some doubts have been entertained as to the extent and application of the rule.[1] The high authorities cited in the footnote[2] and the general practice of the profession, appear, however, to show that these doubts are groundless.

§ 643. Hearsay evidence of particular facts being inadmissible in support of public rights,[3] it may be urged that such evidence ought to be also inadmissible upon questions of pedigree. But, "on cases of general right, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; and the family transactions among the relations of the parties. Therefore, what is thus

[1] Tindal, C.J., rejected the declarations of deceased persons, tendered to prove the ages of their relatives, on the ground that, though admissible for the purpose of showing the relationship, they could not be received as proof of particular facts, such as the ages of parties. Lord Brougham, however, on a motion for a new trial, intimated a very strong opinion in favour of the admissibility of the evidence, and subsequently stated that Parke and Littledale, JJ., entirely concurred in this view: Kidney *v.* Cockburn, 1831, 2 Russ. & My. 168.

[2] Herbert *v.* Tuckal, 1663. T. Raym. 84; recognised by Lord Ellenborough, in Roe *v.* Rawlings, 1806, 7 East, 291; case cited in 1 Ph. Ev. 214, from Vin. Ab. Ev. T. b. 91, 1731; Vulliamy *v.* Huskisson, 1838, 3 Y. & C. Ex. 82; Ryder *v.* Malbone, 1831, cited 2 Russ. & Myl. 169, as a decision by Littledale, J., Ld. Mansfield, in Goodright *v.* Moss, 1777, 2 Cowp. 594; Lord Brougham, in Monkton *v.* Att.-Gen., 1831; 2 Russ. & My. 156; K. Bruce, V.-C., in Shields *v.* Boucher, 1847, 1 De G. & Sm. 51; Pollock, C.B., in Plant *v.* Taylor, 1861, 31 L. J. Ex. 289; 1 Ph. Ev. 213; Hubb. Ev. of Suc. 649; 3 St. Ev. 841.

[3] Ante, § 617.

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dropped in conversation upon such subjects may be presumed to be true."[1]

§ 644. Still, hearsay evidence must, when given as to pedigree, be *confined to such facts as are immediately connected* with the question of pedigree; and declarations as to independent facts, from which the date of a genealogical event may be inferred, will probably be rejected. The following examples will explain the extent and operation of this rule. In a question of legitimacy, turning upon the time of birth, a declaration by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, when coupled with proof of the time when her, the witness', own child was born, tended to fix the alleged bastard's birth at a period subsequent to its parent's marriage, but its admissibility is doubtful;[2] in a case,[3] turning on the relative seniority of three sons, born at a birth, declarations by the father that he had christened them Stephanus, Fortunatus, and Achaicus, according to the order of the names in St. Paul's First Epistle to the Corinthians,[4] for the purpose of distinguishing their seniority, and also declarations by an aunt, who, at the confinement, with a similar object, had tied strings round the arms of the second and third child, were, however, admitted. In the former case, the fact of suckling the child had no direct bearing on its age or legitimacy, but was only a species of circumstantial evidence from which these facts might be inferred; whilst in the latter, the christening and the tying strings round the arms of the children were intended from the first to afford the means of ascertaining their relative seniority.[5]

§ 645. Mr. Phillipps justly observes that, "there appears to be no foundation for any distinction between cases where a matter of pedigree is the direct subject of the suit, and other cases where it occurs incidentally."[6] The declarations of relatives are, nevertheless, only admissible in cases which directly

[1] Sir J. Mansfield in Berkeley Peerage Case, 1811, 4 Camp. 415 (H. L.).

[2] Isaac *v.* Gompertz, 1837, Hubb. Ev. of Succ. 650. Gurney, B., admitted this evidence, but Lord Cottenham expressed an opinion that he was wrong in so doing.

[3] Vin. Ab. Ev. T. b. 91; probably referred to as Spadwell *v.*——, 1731, by Lawrence, J., in the Berkeley Peer., 1811, 4 Camp. 410 (H. L.).

[4] Ch. 16, v. 17.

[5] See, further, on this subject, Palmer *v.* Palmer, 1885, 18 L. R. Ir. 192; the Lovat Peerage Case, 1885, 10 App. Cas. 763 (H. L.).

[6] 1 Ph. Ev. 216, n. 5.

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§§ 645, 646. or indirectly involve some question of relationship, and the fact sought to be established by hearsay is required to be proved for some *genealogical* purpose;[1] they will not necessarily be admissible when the date, place, or other facts connected with the birth, marriage or death of a party is the subject of controversy. Consequently, in an action for use and occupation by a reversioner against a tenant *pour autre vie*, who has held over after the death of the *cestui que vie*, the latter's death must be proved in the ordinary way, and the hearsay of relatives will be inadmissible;[2] while letters written by the deceased father of the defendant cannot be read in support of a defence of infancy;[3] where several sons are entitled to an estate in order of seniority, in an action of ejectment for it by a younger son, family tradition is not admissible to prove the death of an elder;[4] and in a settlement case,[5] the declarations of a deceased father as to the place where his child was born, cannot be received as evidence of the birth settlement of the child.[6]

§ 646. The settlement case just referred to[7] does not, however (as has sometimes been supposed), establish that in a strict question of pedigree, hearsay evidence of *locality*,—or, in other words, the declarations of deceased persons respecting the *places* where their relatives were born, and where they married, resided, came from, went to, or died,—cannot be received.[8] And hearsay evidence of locality has, indeed, on several occasions been admitted to elucidate matters of strict pedigree.

[1] Shields *v.* Boucher, 1847, 1 De G. & Sm. 51 (K. Bruce, V.-C.). See Smith *v.* Smith, 1876, Ir. R. 10 Eq. 273.

[2] Whittuck *v.* Waters, 1830, 4 C. & P. 376.

[3] Figg *v.* Wedderburne, 1842, 6 Jur. 218. See, also, Haines *v.* Guthrie, 1884, 13 Q. B. D. 818 (C. A.).

[4] Palmer *v.* Palmer, 1885, 18 L. R. Ir. 192.

[5] R. *v.* Erith, 1807, 8 East, 539. In this case the child was a bastard, and the declarations of his putative father would therefore have been inadmissible even on a question of pedigree; but this point was not raised. See ante, §§ 636, 637.

[6] Strenuous unsuccessful efforts were formerly made to render the declarations of deceased persons admissible in proof of particulars respecting their settlements. See R. *v.* Eriswell, 1790, 3 T. R. 721; R. *v.* Chadderton, 1801, 2 East, 29; R. *v.* Ferry Frystone, 1801, 2 East, 54; R. *v.* Abergwilly, 1801, 2 East, 63.

[7] R. *v.* Erith, 1807, 8 East, 539.

[8] See Shields *v.* Boucher, 1847, 1 De G. & Sm. 51, where Knight Bruce, V.-C., intimated a strong opinion that such evidence was admissible, and observed that in R. *v.* Erith, 1807, 8 East, 539, Lord Ellenborough carefully rested the judgment on the fact that no question whatsoever of relationship was involved in the inquiry. So

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§ 647. For example, where the question was, whether A.B., an ancestor of the declarant C., was the same person as A. B., a blacksmith, who had resided at X., a declaration by C. that his ancestor was a blacksmith, and that he resided at X., was received in evidence.[1] If it be necessary to show that a family had relations who lived at a particular place, declarations by a deceased member of the family, that "he was going to visit his relatives at that place," will be evidence; not, indeed, that he went there, or that any person of his name lived in that neighbourhood; but as proving a tradition in the family, that they once had relations living in the place in question, which tradition, in the event of its being shown by other evidence that persons of the same name had resided there, might be important as a mode of identifying those persons with the branch of the family alluded to;[2] and evidence has also been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant.[3]

§ 648. The *forms* under which hearsay evidence in matters of pedigree may be presented are very numerous. Letters written under dictation from, and in the name of, a deceased person, are regarded as declarations by such deceased person,[4] and all oral declarations by a deceased *relative* are clearly admissible if made *ante litem motam*.[5] But declarations by deceased relatives, however made, are rarely deserving of much weight;[6] for not only are they usually sought to be established by persons

that, in the opinion of the V.-C., if the evidence tendered in that case had been required for any genealogical purpose, a different conclusion might very possibly have been arrived at.

[1] Hood *v.* Lady Beauchamp, 1836, Hubb. Ev. of Succ. 468 (Shadwell, V.-C.).

[2] Rishton *v.* Nesbitt, 1844, 2 M. & Rob. 554.

[3] Id. citing Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 161. Knight Bruce, V.-C., in a very elaborate judgment in Shields *v.* Boucher, 1847, 1 De. G. & Sm. 51, intimated a strong opinion, that, in a controversy merely genealogical, declarations made by a deceased person as to where he or his family came from, "of what place" his father was designated, and what occupation his father followed, would be admissible, and might be most material evidence for the purpose of identifying and individualising the person and family under discussion.

[4] In re Turner, Glenister *v.* Harding, 1885, 29 Ch. D. 985.

[5] See ante, § 644; Lovat Peerage case, 1885, 10 App. Cas. 763 (H.L.); In re Porter, Pearson *v.* Att.-Gen., 1885, 53 L T. 707.

[6] See *e.g.*, the Lovat Peerage case, 1885, 10 App. Cas. 763 (H. L.).

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§§ 648, 649. interested in the litigation, but they are often recorded or remembered for the first time after the contest has arisen. The court, therefore, necessarily runs considerable risk of being deceived by deliberate falsehood, and the more so as it is obviously difficult, not to say impossible, to convict a witness of perjury in narrating what he alleges that he heard in a conversation with a deceased person.[1] Even assuming that the sincerity of the witness cannot reasonably be doubted, men are often, without deliberately intending to falsify facts, extremely prone to believe what they wish, to confound what they believe with what they have heard, and to ascribe to memory what is merely imagination.[2]

§ 649.[3] *Family conduct*, too—such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which the opinion and belief of the family may be inferred, and as resting ultimately on the same basis as evidence of family tradition. For example, "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate."[4] On the other hand, the concealment of the birth of a child from the husband,[5]—the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognised in the family as the legitimate offspring of the husband, the fact that the alleged father had never recognised the child as his, and that the mother had never so put the child forward,[6]—are all circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favour of the issue of a married woman.[7] Again, on a question

[1] Crouch *v.* Hooper, 1852, 16 Beav. 182; Webb *v.* Haycock, 1854, 19 Beav. 342.

[2] Crouch *v.* Hooper, 1852, 16 Beav. 182.

[3] Gr. Ev. § 106, in part.

[4] Berkeley Peerage case, 1811, 4 Camp. 416 (Sir J. Mansfield) (H. L.).

[5] Hargrave *v.* Hargrave, 1848, 2 C. & Kir. 701.

[6] Powlett Peer., [1903] A. C. 395.

[7] Goodright *v.* Saul, 1791, 4 T. R. 356; Morris *v.* Davies, 1836-37, 5 Cl. & Fin. 163 (H. L.); Banbury Peer, 1811, App. n. (*e*) to Le Marchant's Rep. of Gardner Peer., 389, 432, 433 (H. L.); R. *v.* Mansfield, 1841, 1 Q. B. 444; Townshend Peer., 1843, 10 Cl. & Fin. 289 (H. L.); Atchley *v.* Sprigg, 1864, 33 L. J. Ch. 345.

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whether a person, from whom the claimant shows descent, was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show, either that such person was not the son of the testator, or at least that he had died without issue before the date of the will.[1] The production, too, of a man's will, in which no notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations, is cogent evidence of his having died childless.[2]

§ 650.[3] *Entries made by a parent or relation in bibles,*[4] prayer-books,[5] missals,[6] almanacs,[7] or indeed in any other book, or in any document or paper,[8] stating the fact and date of the birth, marriage,[9] or death of a child, or other relation, are also evidence, in pedigree cases, as being written declarations of the deceased persons who respectively made them. Entries in a family bible or testament will be admissible, even without proof that they have been made by a relative; for as this book is the ordinary register of families, and is usually accessible to all its members, the presumption is that the whole family have more or less adopted the entries contained in it, and have thereby given them authenticity.[10] This presumption, however, will not prevail in favour of an entry in any other book of however religious a character, but proof must be given, either that the entry was made by some member of the family,[11] or that it has

[1] Tracy Peer., 1843, 10 Cl. & Fin. 191 (H. L.); Robson *v.* Att.-Gen., 1843, 10 Cl. & Fin. 500 (Ld. Cottenham) (H. L.). See ante, § 620, ad fin. Hungate *v.* Gascoigne, 1846, 2 Phill. 25; De Roos Peer., 1804-5, 2 Cooper, 542 (H. L.).

[3] Gr. Ev. § 104, in part.

[4] Berkeley Peer., 1811, 4 Camp. 415 (H. L.).

[5] Leigh Peer., 1828, Parl. Min. 307, 310 (H. L.).

[6] Slane Peer., 1855, 5 Cl. & Fin. 41 (H. L.).

[7] Herbert *v.* Tuckal, 1663, T. Raym. 84.

[8] Berkeley Peer., 1811, 4 Camp. 418 (H. L.). See Jackson *v.* Cooley, 1811, 8 Johns. 128, 131 (Am.); Douglas *v.* Saunderson, 1791, 2 Dall. 116 (Am.); Carskadden *v.* Poorman, 1840, 10 Watts, 82 (Am.).

[9] In the Sussex Peer., 1844, 11 Cl. & Fin. 85, 98 (H. L.), an entry made by the mother of the claimant in her prayer book, declaring the fact of her marriage, was admitted in evidence.

[10] Berkeley Peer., 1811, 4 Camp. 421 (H. L.); Monkton *v.* Att.-Gen., 1831, 2 Russ. & My. 162, 163; Hubbard *v.* Lees, 1866, L. R. 1 Ex. 225.

[11] Tracy Peer., 1843, Hubb. Ev. of Succ. 673 (H. L.); Crawford and Lindsay Peer., 1848, 2 H. L. C. 558, 560.

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§§ 650, 651.

been acknowledged or treated by a relative as a correct family memorial,[1] or, at least, if ancient, that it was made at the time when it purports to have been written. In order to establish this last fact, the evidence of skilled witnesses, conversant with manuscripts of different ages, is admissible, though, as before observed, such evidence is entitled to very little weight.[2]

§ 651.[3] The *correspondence* of deceased members of the family,[4] too, on proof of the handwriting,[5] *recitals in family deeds* (such as *marriage settlements*,[6] and other instruments[7]), *descriptions in wills*[8], and the like, will be received as evidence in pedigree cases. Moreover, recitals of descent, and descriptions of parties, in such deeds other than family instruments, will be received, provided such deeds come from the proper custody, and are proved, or may from age be presumed, to have been executed by some member of the family to which the statements refer.[9] Wherever the statement is contained in a deed, the execution of the deed by a relation is, however, an indispensable requisite.[10] But where the declaration is contained in the draft of a will prepared by direction of the deceased, and on information derived solely from him, such draft is admissible.[11] And, *à fortiori*, a will which was duly executed,

[1] Hood *v.* Beauchamp, 1836, 8 Sim. 26.

[2] Tracy Peer., 1843, 10 Cl. & Fin. 154 (H. L.); ante, § 50.

[3] Gr. Ev. § 104, in part.

[4] Huntingdon Peer., 1818, Att.-Gen.'s Report, 357 (H. L.); Kidney *v.* Cockburn, 1831, 2 Russ. & My. 168; Leigh Peer., 1828, Pr. Min. pt. 2, p. 140 (H. L.); Hastings Peer., 1840, Pr. Min. 196 (H. L.). See Butler *v.* Mountgarret, 1859, 7 H. L. C. 633.

[5] Marchmont Peer., 1840, Pr. Min. 345, 353 (H. L.). See Airth Peer., 1839, Pr. Min. 105 (H. L.).

[6] Neal *v.* Wilding, 1740, 2 Str. 1151; De Roos Peer., 1804-5, 2 Coop. 541, 542 (H. L.); Chandos Peer., 1791, Pr. Min. 27 (H. L.); Zouch Peer., 1807, Pr. Min. 276 (H. L.); Devon Peer., 1832, by Nicolas, App. pp. 44, 46 (H. L.); L'Isle Peer., 1825, Pr. Min. 116 (H. L.); Banbury Peer., 1809, Pr. Min. 6, 117 (H. L.); Vaux Peer., 1824, Pr. Min. 44 (H. L.); Huntley Peer., 1838, Pr. Min. 15 (H. L.); Roscommon Peer., 1824, Pr. Min. 36 (H. L.).

[7] Smith *v.* Tebbitt, 1867, L. R. 1 P. & D. 354; Stafford Peerage case, 1825, Pr. Min. 110 (H. L.).

[8] Vulliamy *v.* Huskisson, 1838, 3 Y. & C. Ex. 82; De Roos Peer., 1804, 2 Coop. 541, 542 (H. L.); L'Isle Peer., 1825, by Nicolas, 51, 53 (H. L.).

[9] Marmyon Peer., 1818, Pr. Min. 111 (H. L.); Hastings Peer., 1840, Pr. Min. 200 (H. L.); Borthwick Peer., 1812, Pr. Min. 62 (H. L.); Hungate *v.* Gascoigne, 1846, 2 Coop. 407, 417; De Roos Peer., 1804, 2 Coop. 541, 542 (H. L.). See Stokes *v.* Dawes, 1826, 4 Mason, 268 (Am.).

[10] Slaney *v.* Wade, 1836, 1 Myl. & Cr. 338; Foot *v.* Clarke, 1826, 1 Russ. 604.

[11] Lambert, In re, 1886, 56 L. J. Ch. 122.

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§§ 651, 652.

but which has been revoked as a will, is also admissible.[1] In regard to recitals of pedigree in old answers in Chancery (which were sworn), those relating to facts which were not in controversy are admitted, but those referring to facts which were then in controversy are excluded as made *post litem motam*.[2] Recitals in old bills in equity are always inadmissible, being regarded as the mere flourishes of the draughtsman.[3] The admissibility of proceedings in a Sheriff Court in Scotland is governed by the same principles.[4]

§ 652.[5] *Inscriptions on tombstones*,[6] coffin-plates,[7] mural monuments,[8] family portraits,[9] engravings on rings,[10] hatchments, charts of pedigree,[11] and the like, are also admissible evidence in pedigree cases. Those proved to have been made by, or under the direction of, a deceased relative, are admitted as his declarations; such as are only proved to have been publicly exhibited, may be supposed to have been well known to the family, and they are also admitted on the ground of tacit and common assent.[12] It is presumed,—though this is a presumption which

[1] See Doe *v.* Pembroke, 1809, 11 East, 504.

[2] See 1 Ph. Ev. 219, 220, and the authorities there cited. See, also, De Roos Peer., 1804, 2 Coop. 542 (H. L.).

[3] Boileau *v.* Rutlin, 1848, 2 Ex. 678 (Parke, B., citing the Banbury Peer., 1809, Selwyn, N. P. 748—750 H. L.). These cases appear to overrule Taylor *v.* Cole, 1799, 7 T. R. 9, n.

[4] Lyell *v.* Kennedy, 1889, 14 A. C. 437 (H. L.).

[5] Gr. Ev. § 105, in part.

[6] Monkton *v.* Att.-Gen., 1831, 2 Russ. & Myl. 163; Goodright *v.* Moss, 1777, 2 Cowp. 594.

[7] Chandos Peer., 1791, Pr. Min. 10 (H. L.); Rokeby Peer., 1830, Pr. Min. 4 (H. L.); Lovat Peer., 1827, Pr. Min. 77 (H. L.).

[8] Slaney *v.* Wade, 1836, 1 Myl. & Cr. 338; De Roos Peer., 1804-5, 2 Cowp. 544 (H. L.).

[9] Camoys Peer., 1839, 6 Cl. & Fin. 801 (H. L.).

[10] Vowles *v.* Young, 1806, 13 Ves. 144.

[11] Hungate *v.* Gascoigne, 1846, 2 Coop. 414, 416.

[12] Monkton *v.* Att.-Gen., 1831, 2 Russ. & Myl. 163; Goodright *v.* Moss, 1777, 2 Cowp. 594.

[13] Monkton *v.* Att.-Gen., 1831, 2 Russ. & Myl. 163; Davies *v.* Lowndes, 1843, 7 Scott, N. R. 193, Parke, B., observes, "The ground upon which the inscription on a tombstone or a tablet in a church is admitted, is that it is presumed to have been put there by a member of the family cognisant of the facts, and whose declaration would be evidence; where a pedigree hung up in the family mansion is received, it is on the ground of its recognition by the members of the family." Doubts have been expressed at Nisi Prius respecting the admissibility of an inscription on a tombstone in a burial-ground for *dissenters* (Whittuck *v.* Waters, 1830, 4 C. & P. 376 (Park, J.)); but such doubts appear wholly groundless, since this species of evidence has been admitted by the House of Lords in Peerage claims (Saye and Sele Peer., 1781, 1 H. L. C. 507; Hubback's Ev. of Succ., 1844, citing Serj. Hill's Collect. in Linc. Inn Library, vol. 26), and it may be pointed out that

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§§ 652—654. is doubtless often contrary to the fact, —that the relatives of a family would not permit an erroneous inscription to remain; and that a person would not knowingly wear a ring which bore a mis-statement upon it.[2]

§ 653.[3] Mural and other funereal inscriptions are provable, as already shown,[4] by *copies*, or other secondary evidence. Their value as evidence depends much on the authority under which they were set up, and on the distance of time between their erection and the events which they purport to commemorate.[5] If parol testimony of their contents be offered, on the ground that the original monuments are destroyed or effaced, the court will not be satisfied, unless the prior existence of the monuments, and the genuineness of the inscriptions, be established in the very strongest manner that the circumstances will admit.[6] The ease with which evidence of this nature can be manufactured, and the difficulty of fixing the witnesses with perjury, render it needful to enforce this rule with strictness.

§ 654. The family recognition of the truth of a document may not only arise from its publicity, but also from other circumstances. If a document, though privately kept, be clearly proved to have been preserved in a family as an authentic memorial of pedigree, it will be receivable in evidence without proof of its origin.[7] The mere production, however, of a document from among the family archives,[8] and, *à fortiori*, its production from

in the case cited an inscription on a tombstone in the dissenters' burial-ground in Bunhill Fields was admitted by the House of Lords, and that inscriptions on *foreign* monuments have also been received in evidence: Hastings Peer., 1840, Pr. Min. 197 (H. L.); Perth Peer., 1848, 2 H. L. C. 874.

[1] Some remarkable mis-statements on monuments are mentioned in 1 Ph. Ev. 222, n. 4. The author of this work found on a monument in a London cemetery this startling announcement:—"The victim of a mother's temper."

[2] Vowles *v.* Young, 1806, 13 Ves. 147.

[3] Gr. Ev. § 105, in part as to first five lines.

[4] Ante, § 438; and see Tracy Peer., 1839-43, 10 Cl. & Fin. 164 (H.L.); Roscommon and Leigh Peer., 1824, Hubb. Ev. of Succ. 692 (H. L.); Slaney v. Wade, 1836, 1 Myl. & Cr. 338; Perth Peer., 1848, 2 H. L. C. 874.

[5] Athenry Peer., 1836, Pr. Min. 45 (H. L.); Vaux Peer., 1836, Pr. Min. 129 (H. L.); Fitzwalter Peer., 1842, Pr. Min. 34 (H. L.).

[6] Tracy Peer., 1839, 10 Cl. & Fin. 154 (H. L.). See Shrewsbury Peer., 1857, 7 H. L. C. 27.

[7] Vaux Peer., 1836, Pr. Min. 62 (H. L.); Camoys Peer., 1839, 6 Cl. & Fin. 801—803 (H. L.).

[8] Fitzwalter Peer., 1842, Pr. Min. 45 (H. L.); Lovat Peer., 1827, Pr. Min. 81 (H. L.); D. of Devonshire *v.* Neill, 1877, 2 L. R. Ir. 132, 146; 8 App. Cas. 147 (Palles, C. B.) (H. L.) (Ir.).

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a museum, or other public place of deposit,[1] will not render it admissible, without proof that it was made or recognised by some member of the family. §§ 654—657.

§§ 655–6. The question how far a pedigree, purporting to have been *compiled*, either wholly or in part, *from registers* and other documents which are *not shown to have been lost*, is admissible has been much discussed. A Welsh pedigree, proved to be in the handwriting of one of the ancestors of the defendant, produced from the proper custody, and tracing the genealogy of the family from an almost fabulous antiquity, and bringing the descent down to the immediate contemporary relatives of the writer, and containing at its foot a memorandum in these words: "Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, A.D. 1733, by his loving kinsman, Wm. Lloyd," was offered in evidence; and the Common Pleas rejected the whole. But the Exchequer Chamber, after much doubt and full consideration, decided that part, if not all, of the pedigree in question was receivable in evidence,[2] saying, "the pedigree in question was admissible, because it was certainly acknowledged by Wm. Lloyd to be correct."

§ 657. *Armorial bearings*, whether carved on wood, painted on glass, engraved on monuments or seals, or otherwise emblazoned, are also admissible in cases of pedigree; not only as tending to prove that the person who assumed them was of the family to which they of right belonged, but as illustrating the particular branch from which the descent was claimed, or as showing by the impalings or quarterings, the nature of the blazonry, or the shape of the shield, what families were allied by marriage, or what members of the family were descended from an illegitimate stock, or were maidens, widows, or heiresses.[3] The value of this

[1] Chandos Peer., 1791, Pr. Min. 11 (H. L.).

[2] Davies *v.* Lowndes, 1843, 12 L. J. C. P. 506 (Ld. Denman).

[3] Harl. MS. 1836, 6141; Hervey *v.* Hervey, 1772, 2 W. Bl. 877; Chandos Peer., 1791, Pr. Min. 6 (H. L.); Huntingdon Peer., 1818, Att.-Gen.'s Rep. 359 (H. L.); Hastings Peer., 1840, Pr. Min. 313 (H. L.); Shrewsbury Peer., 1857, 7 H. L. C. 10; Fitzwalter Peer., 1842,

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§ 657. evidence depends almost wholly upon its antiquity. Since the Revolution,[1] the heralds have exercised no authority in correcting usurpation, and, therefore, the use of armorial bearings subsequently to that date is entitled to but little, if any, weight as evidence of genealogy.[2] When proof of this nature is offered, some officer of the Heralds' College should be in attendance, to explain the heraldic meaning of the evidence produced.[3]

Pr. Min. 49 (H. L.); Camoys Peer., 1667, Pr. Min. 58 (H. L.); Hub. Ev. of Suc. 694.

[1] The last Herald's visitation was in 1686, the first having been in 1528. See Hub. Ev. of Suc. 542.

[2] 1 Ph. Ev. 224; Hub. Ev. of Suc. 696.

[3] See Chandos Peer., 1791, Pr. Min. 6 (H. L.). Besides the different species of evidence enumerated above, the Heralds' books, inquisitions post mortem, parish books, registers, &c., are occasionally admissible as evidence,—not, however, as the hearsay evidence of relatives, but as public documents, and the law respecting them will be discussed hereafter: Part V. Chap. IV. See De Roos Peer., 1804, 2 Coop. 545—552 (H. L.).

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CHAPTER V.

ANCIENT POSSESSION.

§§ 658, 659.

§ 658. A THIRD exception to the general rule by which hearsay evidence is rejected, exists in favour of *ancient documents* (by which is meant documents more than thirty years old), when they are tendered in support of *ancient possession*. These are often the only attainable evidence of ancient possession, and therefore the law, yielding to necessity, allows them to be read on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but *purport* to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate.[1] This species of proof demands careful scrutiny, for, first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next, the documents are not *proved*, but are only *presumed* to have constituted part of the res gestæ. Forgery and fraud are, however, matters, comparatively speaking, of rare occurrence, and a fabricated deed generally betrays, from some anachronism or other inconsistency, internal evidence of its real character. The danger of admitting these documents is, consequently, less than might be supposed. It is more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance of evils, this kind of proof has, subject to certain qualifications, for many years past been admitted.[2]

§ 659. But care is especially taken to ascertain the *genuineness* of the ancient documents produced; and this may in general be

[1] See Malcomson *v.* O'Dea, 1863, 10 H. L. C. 593; Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121.

[2] See 1 Ph. Ev. 273; 1 St. Ev. 67; Gr. Ev. § 141; and Best, Ev. 615.

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§§ 659, 660.

shown, primâ facie, by proof that they come from the *proper custody*.[1] Proof of this is, however, required not only where documents are tendered in support of ancient possession, but in most cases where deeds, papers, or writings are rendered admissible by any rule of law without strict proof of their authenticity. It, therefore, is highly important to explain, with as much precision as possible, the legal meaning of the words "proper custody."[2]

§ 660. As to what is "proper custody," Tindal, C.J., has said,[3] "Documents found in a place in which, and under the care of persons with whom such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit.* If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various, that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."[4]

[1] See ante, §§ 432 et seq.

[2] As to what is "proper custody," see Bishop of Meath *v.* Marquis of Winchester, 1836, 3 Bing. N. C. 198. See, also, Doe *v.* Samples, 1838, 8 A. & E. 151; Doe *v.* Phillips, 1845, 16 L. J. Q. B. 269.

[3] In Bishop of Meath *v.* Marquis of Winchester, 1836, 3 Bing. N. C. 198.

[4] For American authorities, see Bar *v.* Gratz, 1819, 4 Wheat. 213, 221; Winn *v.* Patterson, 1835, 9 Peters, 663—675; Clarke *v.* Courtney, 1831, 5 Pet. 319, 344; Hewlett *v.* Cock, 1831, 7 Wend. 371, 374; Duncan *v.* Beard, 1820, 2 Nott & M'C. 400; Middleton *v.* Mass, 1819, 2 Nott & M'C. 55.

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§§ 661, 662.

§ 661. These principles have accordingly led, on the one hand, to the rejection of old grants to abbeys, offered as evidence of private rights, where the possession of them appears altogether unconnected with the persons who had any interest in the estate;[1] of a manuscript found in the Heralds' Office, enumerating the possessions of a dissolved monastery, the possession of which is unconnected with an interest in the property;[2] of a curious manuscript book, entitled the "Secretum Abbatis," preserved in the Bodleian Library at Oxford, and containing a grant to an abbey;[3] of an old grant to a priory, brought from the Cottonian MSS. in the British Museum;[4] of what purported to be a copy of an ancient Admiralty chart, brought from the British Museum;[5] and of ancient writings, purporting respectively to be, the one an endowment of a vicarage, and the other an inspeximus of the endowment under the seal of a bishop, purchased at a sale as part of a private collection of manuscripts.[6] The registers of burials and baptisms (being by statute[7] required to be kept by the clergyman of the parish either at his own residence or in the church) have, in the absence of all explanation on the subject, been rejected, as not coming from the proper custody, when produced from the house of the parish clerk.[8] Terriers found among the papers of a mere landholder in the parish must also be rejected,[9] because the legitimate repository for such documents would be either the registry of the bishop, the registry of the archdeacon, or the church chest.[10]

§ 662. In further accordance with the principles above summarised by Tindal, C.J., it has, on the other hand, been held

[1] 3 Bing. N. C. 201, 1836 (Tindal, C.J.).

[2] Lygon *v.* Strutt, 1795, 2 Anstr. 601.

[3] Michell *v.* Rabbetts, 1810, cited 3 Taunt. 91.

[4] Swinnerton *v.* M. of Stafford, 1810, 3 Taunt. 91.

[5] Mercer *v.* Denne, [1904] 2 Ch. at p. 545 (Farwell, J.).

[6] Potts *v.* Durant, 1795, 3 Anstr. 789.

[7] 52 G. 3, c. 146, §§ 1 and 5.

[8] Doe *v.* Fowler, 1850, 19 L. J. Q. B. 15.

[9] Atkins *v.* Hatton, 1794, 2 Anstr. 386; Atkins *v.* Ld. Willoughby de Broke, 1794, 2 Anstr. 397. See, also, Bidder *v.* Bridges, 1885, 37 Ch. D. 406.

[10] Armstrong *v.* Hewett, 1817, 4 Price, 216; Potts *v.* Durant, 1796. In Randolph *v.* Gordon, 1815, 5 Price, 312, this doctrine was carried to its extreme limit, for, the grandson of a former rector having produced a book purporting to be the book of such rector, it was rejected, as he did not show that he had found it among his grandfather's papers, or that it had come into his possession in a legitimate manner; see, also, Manby *v.* Curtis, 1815, 1 Price, 225.

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§§ 662, 663. that the poor-house of a union is not an improper repository for the documents of any parish within the union;[1] that an old chartulary of a dissolved abbey may be admitted, when found in the possession of the owner of part of the abbey lands, though not of the *principal proprietor*;[2] that an old book of a collector of tithes is equally well authenticated, whether produced from the custody of the successor, or executor, of the incumbent, or from the hands of the successor of the collector;[3] and that an unproved will, more than thirty years old, disposing of real and personal estate, and produced from the custody of a younger son of the testator, who, in common with his brothers, derived a benefit under it, may be admitted, though it was contended that it ought to have been deposited in the ecclesiastical court of the diocese.[4]

§ 663. Again, an expired lease produced from the custody of the lessor, and proved to have been received by him from a former occupier of the demised premises, who had for several years paid the precise rent reserved by it, and had, subsequently to the expiration of the term, procured such expired lease from two strangers who claimed no interest in it, and delivered it up to the lessor, was held to be admissible, without proof in what manner it had come into the hands of these strangers.[5] A case stated for counsel's opinion by a deceased bishop, respecting his right of presentation to a living, has been admitted against a subsequent bishop of the same see, on a question touching the same right, though the paper was not found in the public registry of the diocese, but among the private family documents of the descendants of the former bishop;[6] and a settlement,

[1] Slater *v.* Hodgson, 1846, 9 Q. B. 727.

[2] Bullen *v.* Michel, 1816, 4 Dowl. 297. See, also, R. *v.* Mytton, 1860, 29 L. J. M. C. 109. The strictly proper custody for such a document as this would have been the Augmentation Office (Bullen *v.* Michel (Ld. Redesdale), supra); but as between the different proprietors of the abbey lands, it might naturally be supposed to have been deposited with the largest; and the court held, that its actual place of custody was one where it might reasonably be expected to be found: Bishop of Meath *v.* Marquis of Winchester, 1836, 3 Bing. N. C. 201.

[3] Id.; referring to Jones *v.* Waller, 1753, 3 Gwill. 346.

[4] Doe *v.* Pearce, 1839, 2 M. & Rob. 240; Andrew *v.* Motley, 1862, 32 L. J. C. P. 128.

[5] Rees *v.* Walters, 1838, 7 L. J. Ex. 138.

[6] Bp. of Meath *v.* M. of Winchester, 1836, 3 Bing. N. C. 183, 202.

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reserving a life estate to himself, and coming from amongst the settlor's papers, has, where more than thirty years old, been allowed, in an action of ejectment by his subsequent incumbrancers, to be put in evidence, though it was strongly urged that the trustees or their representatives were the parties entitled to its custody. Again, a deed to which as well as to the suit, trustees and executors were parties, when produced by them comes from proper custody.[2]

§ 664. There is some doubt whether the custody of a document must be proved by a sworn witness, when it purports on its face to belong to the party who tenders it in evidence. In one or two settlement cases, the respondents were permitted to produce old certificates, purporting to have been granted to them by the appellants, without giving any account respecting their custody.[3] But where,[4] on a question of boundary, plaintiff's counsel proposed to read certain manor-books without proving the custody whence they came, on the ground that they belonged to the lord, who was admitted to be the real plaintiff, the court held that they could not be read; Coleridge, J., observing that, unless some witness was sworn for the purpose of proving their custody, they might have been procured from a grocer's shop. But where the witness producing the document can swear that he received it from the representative of the person originally entitled to it, as a paper which had belonged to such person, this evidence will in ordinary cases be sufficient, without calling the representative himself to explain how he became possessed of the document.[5]

§ 665. The mere production of an ancient document, unless supported by some corroborative evidence of *acting* under it, or of modern *possession*, would be entitled to little, if any, weight.[6] Still, there appears to be no strict rule of law, which would authorise the judge in withdrawing it altogether from the consideration of the jury:—in other words, the absence of proof

[1] Doe *v.* Samples, 1838, 8 A. & E. 151. See, also, Bertie *v.* Beaumont, 1816, 2 Price, 307; Ld. Trimlestown *v.* Kemmis, 1843, 9 C. L. & F. 774 (H. L.).

[2] Miller *v.* Wheatley, 1890, 28 L. R. Ir. 144.

[3] R. *v.* Ryton, 1793, 5 T. R. 259; R. *v.* Netherthong, 1814.

[4] Evans *v.* Rees, 1839, 10 A. & E. 151.

[5] Earl *v.* Lewis, 1801, 4 Esp. 1. See Doe *v.* Keeling, 1848, 17 L. J. Q. B. 199.

[6] 1 Ph. Ev. 276, 278.

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§§ 665—667. of possession affects merely the *weight*, and not the *admissibility*, of the instrument.[1]

§ 666. For instance, where, to prove a prescriptive right of fishery as appurtenant to a manor, ancient licences to fish in the locus in quo appearing on the court-rolls, as granted by former lords in consideration of certain rents, were tendered in evidence, it was held that they were admissible without any proof of the rents having been paid—but it was added that, to give them any *weight*, it must be shown that in later times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in;[2] in an action brought to try the title to the bed of a river, after proof of a grant from Henry VIII., two counterparts of leases having been produced from the plaintiff's muniment room, comprehending the soil in question, but no proof of any payment by a tenant, nor of any modern act of ownership, having been given, the instruments were nevertheless admitted as coming from the right custody, the judge observing that no circumstance in the case threw suspicion upon them, and that "the absence of other kinds of proof was mere matter of observation;"[3] and in one of the numerous ejectments brought by Lord Egremont,[4] a document produced from the muniment room of the property inherited from such ancestor, which purported to be a counterpart of a lease of this land made by him but executed only by the lessee, was held admissible in evidence to show that the land in question had been part of the estate of the lessor's ancestor, though no proof was given of actual possession under it.

§ 667.[5] Subject to the observance of the above rules, *ancient*

[1] Malcomson *v.* O'Dea, 1863, 10 H. L. C. 593, 614: Bristow *v.* Cormican, 1878, 3 App. Cas. 641, 667 (H. L.).

[2] Rogers *v.* Allen, 1808, 1 Camp. 309; Malcomson *v.* O'Dea, 1863, 10 H. L. C. 593, 616.

[3] Duke of Bedford *v.* Lopes, 1838, cited 3 Q. B. 623.

[4] Doe *v.* Pulman, 1842, 11 L. J. Q. B. 319. See, further, Clarkson *v.* Woodhouse, 1782, 3 Doug. 189; Brett *v.* Beales, 1829, M. & M. 418; Tisdall *v.* Parnell, 1863, 14 Ir. C. L. R. 1; Doe *v.* Passingham, 1826, 2 C. & P. 444; Rancliffe *v.* Parkyns, 1818, 6 Dow, 202; McKenire *v.* Fraser, 1803, 9 Ves. 5; Jackson *v.* Blanshan, 1808, 3 Johns. 292 (Am.); Crowder *v.* Hopkins, 1843, 10 Paige, 190 (Am.); Jackson *v.* Luquere, 1825, 5 Cowen, 221, 225 (Am.); Jackson *v.* Lamb, 1827, 7 Cowen, 431 (Am.); Barr *v.* Gratz, 1819, 4 Wheat. 213 (Am.); Hewlett *v.* Cock, 1831, 7 Wend. 371 (Am.).

[5] Gr. Ev. § 144, in great part.

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§ 667.

documents are receivable as evidence that the transactions to which they relate actually occurred. And though they are usually spoken of as hearsay evidence of ancient possession, and, as such, are said to be admitted in exception to the general rule; yet they seem rather to be parts of the res gestæ, and therefore admissible as original evidence, on the principle already discussed. An ancient deed, which has nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead;[2] and, if found in the proper custody, and corroborated by evidence of corresponding ancient or modern enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of property therein mentioned, because this is the usual course of such transactions. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

[1] Ante, §§ 583 et seq.

[2] Ante, § 87.

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CHAPTER VI.

DECLARATIONS BY DECEASED PERSONS WHICH ARE UNLIKELY TO BE FALSE.

§§ 668, 669.

§ 668.[1] The fourth of the six exceptions which we have seen[2] to exist to the general rule that hearsay evidence must be rejected, renders admissible *declarations made by persons since deceased under such circumstances that they are extremely unlikely to be false.*[3] The regard which men usually pay to their own interests is considered a sufficient security against any wilful mis-statement, and affords also a reasonable inference that the declarations or entries were not made under any mistake of fact, or want of information on the part of the declarant. The danger of any fraud in the statement will be still less dreaded, if it be borne in mind, that the evidence is not *receivable till after the death* of the declarant, and that if the opponent can show that the statement was made with any sinister motive, it will at once be rejected. The ordinary tests of truth, afforded by the administration of an oath and by cross-examination, are certainly here wanting; but their place is in some measure supplied by the circumstances of the declarant. The inconveniences that would result from the exclusion of evidence, having such guarantees for its accuracy in fact and its freedom from fraud, are considered as, on the whole, much greater than any which are likely to be experienced from its admission.[4]

§ 669. The most common example of this species of evidence is furnished by "*declarations against interest.*" In order to render declarations against interest admissible as such, it must appear, either by proof or by presumption,[5] that the declarant is

[1] Gr. Ev. § 148, in great part.
[2] Ante, § 607.
[3] Sussex Peer., 1844, 11 Cl. & Fin. 103 (H. L.); Higham *v.* Ridgway, 1808, 10 East, 109; Short *v.* Lee, 1821, 2 Jac. & W. 464.
[4] 1 Ph. Ev. 294.
[5] Doe *v.* Michael, 1851, 17 Q. B. 276; ante, § 198.

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dead.[1] The mere fact that he has absconded abroad in consequence of a criminal charge, or that he is otherwise out of the power of the party to produce as a witness, will not be sufficient.[2] It has been expressly decided that, as regards declarations against *pecuniary* interest, it is "not necessary that the deceased person should have his own knowledge of the fact stated,—that, if the entry charged himself, the whole of it became admissible against all persons,—and that the absence of such knowledge went to the weight, and not to the admissibility, of the evidence."[3] As regards declarations against *proprietary* interest, indeed, it is necessary, where the declarant had no personal knowledge, that he should have simultaneously declared his belief in the hearsay.[4] Moreover, declarations against interest are admissible although such declarations were not contemporaneous with any acts.[5] Such circumstances only affect the weight and not the admissibility of the evidence.

§ 670. It is now fully determined,[6] first, that the statement or entry must have originally been against the actual interest at that time[7] of the person making it;[8] and, secondly, that the interest must be of a *pecuniary* or *proprietary nature*,[9] which

[1] Phillips *v.* Cole, 1839, 10 A. & E. 106, 111; Spargo *v.* Brown, 1829, 9 B. & C. 935; Smith *v.* Whittingham, 1833, 6 C. & P. 78. See ante, § 641, and post, § 703.

[2] Stephen *v.* Gwenap, 1831, 1 M. & Rob. 120.

[3] See Crease *v.* Barrett, 1835, 4 L. J. Ex. 297; Percival *v.* Nanson, 1851, 21 L. J. Ex. 1. The contrary was (to adopt Ld. Denman's expression in O'Connell *v.* The Queen, 1844, 11 Cl. & Fin. 373, H. L.) "taken for granted" formerly, and in the old cases of Higham *v.* Ridgway, 1808, 10 East, 109; Marks *v.* Lahee, 1837, 3 Bing. N. C. 419; Barker *v.* Ray, 1826, 2 Russ. 76; Short *v.* Lee, 1821, 2 Jac. & W. 464. Indeed, in the Sussex Peerage case, 1844, 11 Cl. & Fin. 112 (H. L.), it was so laid down (Lds. Denman and Brougham).

[4] Ld. Trimlestown *v.* Kemmis, 1843, 9 Cl. & Fin. 763 (H. L.).

[5] Doe *v.* Turford, 1832, 1 L. J. K. B. 262.

[6] It was long a matter of doubt in our courts whether the absence of all interest to misrepresent, coupled with peculiar knowledge in the declarant, would not render his declarations admissible after his death. See Glynn *v.* Bk. of England, 1750, 2 Ves. Sen. 38; Higham *v.* Ridgway, 1808, 10 East, 120; Gleadow *v.* Atkin, 1833, 2 L. J. Ex. 153; Roe *v.* Rawlings, 1806, 7 East, 290; and Daly *v.* Wilson, 1842, Milw. Ecc. R. 658 (Ir.).

[7] In re Tollemache, Ex parte Edwards, 1884, 14 Q. B. D. 415 (C. A.).

[8] Berkeley Peer., 1811, Pr. Min. 655 (H. L.), cited and confirmed in Sussex Peer., 1844, 11 Cl. & Fin. 108 (H. L.).

[9] Sussex Peer., 1844, 11 Cl. & Fin. 103 (H. L.), explained and acted upon by Ld. Denman in Davis *v.* Lloyd, 1844, 1 C. & Kir. 276. See, also, Smith *v.* Blakey, 1867, L. R. 2 Q. B. 326; Massey *v.* Allen, 1879, 13 Ch. D. 558.

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§§ 670, 671.

latter term will include declarations as to the *status* (as, *e.g.*, the legitimacy) of the declarant. Lord Chancellor Lyndhurst, in the Sussex peerage case, observed, "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding propositions."[2] Lord Brougham added, "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."[3]

§ 671. A declaration by a deceased person, who would, in the event of her late husband having died intestate, be entitled to a certain amount under a settlement, that he had left a will by which he had given her a less sum, is, however, against pecuniary interest, and therefore admissible.[4] And, in any case, the courts will not weigh with nice scales the amount of the pecuniary interest possessed by the declarant, but will admit every entry which, at the time when it was made, *completely* charged the maker *to any extent*.[5] An incomplete charge will, however, not be sufficient. Therefore, an entry in the following form, "April 4th.—A. came as a servant, to have for the half-year 2*l*.," was held to be inadmissible as a declaration against interest, it being merely a memorandum of an agreement, which must be supposed to have been made on fair terms, and was, consequently, as much in favour of the maker's interest as against it, since, if the

[1] In re Perton, Pearson *v.* Att.-Gen., 1885, 53 L. T. 707.

[2] Sussex Peer., 1844, 11 Cl. & Fin. 110.

[3] Id. This case overrules Standen *v.* Standen, 1791, Peake, R. 45.

[4] Flood *v.* Russell, 1892, 29 L. R. Ir. 91.

[5] Orrett *v.* Corser, 1855, 21 Beav. 52; Richards *v.* Gogarty, 1870, Ir. R. 4 C. L. 300. And see In re O'Leary's Estate, 189 , 1 Ir. R. 283 (Madden, J.), in which a statement in a will that a legacy was bequeathed in satisfaction of a debt was held sufficient evidence of the testator's indebtedness to exempt the legacy from duty.

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master had to pay for the services, the servant had to perform them.[1]

§ 672. The term "declaration," both with regard to declarations against interest and declarations made in the course of duty or business,[2] includes a mere *oral* statement, as well as a written memorandum.[3] The former may indeed be entitled to less weight with the jury than the latter, but the law recognises no distinction between statements made by word of mouth and those made in writing, except where the writing is by deed,[4] or is rendered necessary by some statute.

§ 673. It is further clear that the term "declaration," as applied to declarations against interest, or in the ordinary course of business, embraces all written statements, whether made at the time of the fact declared, or on a subsequent day,[5] and whether made in the ordinary course of business or not,[6] though the most frequent example of it is contained in entries in books of account. Where[7] these are books of collectors of taxes, stewards, bailiffs, or receivers, which are subject to the inspection of others, and in which the entries are generally of money received, charging the party making them, they are clearly admissible.[8] But *private books*, though exclusively retained within the custody of their owners, are also admissible: for their liability to be produced in courts of law on notice or subpœna, and the chance of their contents becoming known through accident, are deemed sufficient security against fraud.[9] An entry, too, is not admissible, unless it either *charges the party making it* with the receipt of money on

[1] R. *v.* Worth, 1843, 12 L. J. M. C. 47.

[2] R. *v.* Buckley, 1873, 13 Cox, C. C. 293.

[3] R. *v.* Birmingham, 1861, 31 L. J. M. C. 63. See Stapylton *v.* Clough, 1853, 23 L. J. Q. B. 5; Fursdon *v.* Clogg, 1842, 10 M. & W. 572; Sussex Peer., 1844, 11 Cl. & Fin. 103 (H. L.). See, also, post, § 708. In Smith *v.* Blakey, 1867, L. R. 2 Q. B. 326, Blackburn, J., said obiter, and citing no authority, that this proposition was "too broadly stated."

[4] Bewley *v.* Atkinson, 1880, 13 Ch. D. 283.

[5] Doe *v.* Turford, 1832, 1 L. J. K. B. 262; Short *v.* Lee, 1821, 2 Jac. & W. 475.

[6] Wi ls *v.* Palmer, 1905, 53 W. R. 169.

[7] Gr. Ev. § 150, in great part.

[8] Barry *v.* Bebbington, 1792, 4 T. R. 514; Goss *v.* Watlington, 1821, 3 B. & B. 132; Whitnash *v.* George, 1828, 8 B. & C. 556.

[9] Higham *v.* Ridgway, 1808, 10 East, 122; Roe *v.* Rawlings, 1806, 7 East, 291; Middleton *v.* Melton, 1829, 10 B. & C. 317; The Swiftsure, 1900, 82 L. T. 389; 9 Asp. M. C. 65 (Jeune, P.); Wills *v.* Palmer, 1905, supra.

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§§ 673—676. account of a third person, or else *acknowledges the payment of money* due to himself, and it is only considered as sufficiently against his interest to be brought within the exception in the one or the other of these two events.[1]

§ 674. No valid objection can be taken to the admissibility of an entry, which charges the person making it with receiving money from another, on the ground that such entry forms only a part of a *general debtor and creditor account*, the *balance of which is in favour of the receiver*.[2] The reasons for this are, first, that if an action were brought against the receiver by his employer, that part of the account which charged the receiver would be evidence against him, while the entries which showed his discharge, though not absolutely inadmissible for him, would, as compared with the entries against his interest, be entitled to very little weight;[3] that in any case (and even if the law were not as just stated) the admission of the receipt of money would still be against his interest, as the balance in his favour would thereby be diminished to the extent of the sum admitted;[4] that a man is little likely to charge himself for the mere purpose of getting a discharge;[5] and that, as almost all entries which are tendered in evidence as being declarations against interest are contained in accounts containing items on both sides, the objection, if allowed to prevail, would strike at the very root of the exception under consideration.[6]

§ 675. It is a question of some difficulty, and the authorities on the point are conflicting, as to whether an entry made by a party acknowledging the payment of money to himself will be admissible, as a declaration against interest, in cases where *such entry is the only evidence of the debt and charge of which it shows the subsequent liquidation*.

§ 676. Some years ago such entries were twice held to be inadmissible,[7] but in three other cases (one of which is as recent

[1] See Foster *v.* M'Mahon, 1847, 11 Ir. Eq. R. 287, 299.

[2] Rowe *v.* Brenton, 1828, 3 M. & R. 267; Williams *v.* Geaves, 1838, 8 C. & P. 592; R. *v.* Worth, 1843, 12 L. J. M. C. 47; Clark *v.* Wilmot, 1841, 1 Y. & C. C. C. 53.

[3] See 2 Smith, L. C. 286.

[4] See Williams *v.* Geaves (Ludlow, Serj., arguendo), 1838, 8 C. & P. 592.

[5] Rowe *v.* Brenton, 1828, 8 B. & C. 737 (Littledale, J.).

[6] Per Ld. Tenterden, in id.

[7] Doe *v.* Vowles, 1833, 1 M. & Rob. 261; Doe *v.* Burton, 1840, 9 C. & P. 254.

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§§ 676, 677.

as 1876), Lord Denman,[1] Lord Wensleydale,[2] and Sir George Jessel,[3] appear to have admitted such entries. The modern view will, probably, ultimately prevail; for though while that part of an entry which is in the writer's own favour stands unconfirmed, suspicions may possibly be entertained that the whole statement is a fiction;[4] it is highly improbable that any tradesman would first enter a false claim on one side of his book, and then admit on the other that it had been satisfied. To require corroborative proof of the claim would, too, tend to embarrass the trial by raising collateral issues, while the very impossibility of obtaining such proof is often the sole cause which renders it necessary to have recourse to the entry at all. It on the whole seems, therefore, that the admission of such entries must, alike on the grounds of justice and expediency, be regarded as a less evil than their rejection.

§ 677. Entries may be received as evidence of *collateral and independent matters*, which, though forming *part of a declaration against interest*, are *not in themselves against the interest of the declarant*.[5] For instance, in a well-known leading case,[6] to prove on what day a child was born, the book of the accoucheur, who had attended the mother in her confinement, was produced, and as his charge for such attendance on a day specified was marked in the book as *paid*, this entry was admitted as evidence of the *date* of the birth, Lord Ellenborough observing, "It is idle to say that the word *paid* only shall be admitted in evidence without

[1] R. *v.* Hendon (an undated decision of Lord Denman's), cited arguendo in Doe *v.* Burton, 1840, 9 C. & P. 255.

[2] R. *v.* Lower Heyford, 1840, cited 2 Smith, L. C. 363. In this case Ld. Wensleydale, and, in that cited in the last note, Ld. Denman, expressly disapproved of Doe *v.* Vowles, 1833, 1 M. & Rob. 261, each saying that he thought Doe *v.* Vowles contrary in principle to the well-known leading case of Higham *v.* Ridgway, 1808, 10 East, 109. But Higham *v.* Ridgway scarcely furnishes a safe guide on the subject, for there it *was* proved by evidence aliundè that the service charged for in the account had in fact been performed; and although Ld. Ellenborough first lays down the general doctrine that "the evidence was admissible upon the broad principle on which receivers' books have been admitted,—namely, that the entry made was in prejudice of the party making it,"—he afterwards, in two different parts of his judgment, adverts to the fact that the work for which the charge was made was proved to have been done by other evidence: 10 East, 117, 119.

[3] Taylor *v.* Witham, and Witham *v.* Taylor, 1876, 3 Ch. D. 605.

[4] 2 Sm. L. C. 283.

[5] Higham *v.* Ridgway, 1808, 10 East, 109.

[6] Id.

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§§ 677—679.

the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged."[1] Similarly in another case[2] the entry in a book of a deceased attorney of charges paid for a lease there stated to have been drawn on a certain day, was held to be evidence that the lease was drawn on that day.

§ 678.[3] In an action upon a joint and several promissory note for 300*l.*, a memorandum of a partial payment made by A., indorsed by the payee upon the note in these terms,—"Received of A. the sum of 280*l.* on account of the within note, *the* 300*l. having been originally advanced to C.*,"—was held, in an action by A. against B. "as a co-surety," to be, after the death of the payee, evidence not only of the payment of the money, but of the fact that C. was the principal debtor; leaving the effect of such proof to be determined by the jury.[4]

§ 679. In yet another case,[5] two entries were held admissible which had been made by a deceased clerk of plaintiff's attorney in the day-book of the office, by the first of which the clerk acknowledged the receipt of 100*l.* from his employer, for the purpose of making a tender to the defendant, while the second was as follows: "Re Colnaghi, attending Mr. Laheè; tendering him 100*l.* for each of the plates, and the etching of the Queen separately; when he declined to let me have same, and said he had no objection to deliver up the impressions, upon payment of the expenses of making them;"—although objection was taken to the admissibility of the second entry, on the ground that it did not charge the party making it, but rather discharged him, as showing that he had fulfilled his duty; that the second entry must be taken by itself, because the first did not prove the tender; and being so taken, there was nothing to show that the clerk did not tender his own money, in which case the entry contained nothing to charge him. And in a still earlier case[6]

[1] Higham *v.* Ridgway, 1808, 10 East, 109.

[2] Doe *v.* Robson, 1812, 15 East, 32. See also In the Goods of Thomas, 1871, 41 L. J. P. & M. 32.

[3] Gr. Ev. § 152, in great part.

[4] Davies *v.* Humphreys, 1840, 9 L. J. Ex. 263. See, also, Percival *v.* Nanson, 1851, 21 L. J. Ex. 1.

[5] Marks *v.* Laheè, 1837, 3 Bing. N. C. 419.

[6] Stead *v.* Heaton, 1792, 4 T. R. 669. This case was said (Alderson, B., in Knight *v.* Waterford, 1840, 10 L. J. Ex. Eq. 57) to carry the principle on which it proceeds to the

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it was held that where, to establish the existence of a customary payment, two entries in a parish book have been put in, the first of which stated the custom, and the second, which was written on the same page, was as follows: "Received of Haworth, who this year disputed *this* our ancient custom, but afterwards paid it, 8*l.*," both entries were admissible, the latter as charging the parish officers with receipt of the money, the former as immediately preceding the latter, and being referred to in it.[1]

§ 680. It must not, however, be supposed that because a document contains entries against interest, it will be admissible in proof of *independent matters*, when the entries against interest do not refer to, or require to be read, in order to explain such matters, but such matters *appear as separate items unconnected with such entries*.[2] For instance, if an account be rendered by a steward containing on one side items charging himself with the receipt of moneys, and on the other side items discharging him by showing how the moneys received had been disbursed, the discharging entries will not be admissible, unless they are necessary to explain the charging entries, or are expressly referred to by them.[3] Accordingly, where,[4] to show that former lords of the manor had been liable to pay poor-rates on the tithes, the accounts of a deceased steward were tendered in evidence, and on one side of these the steward acknowledged the receipt of rent for tithes from a tenant, and on the other side had made an entry in discharge of the former item, by allowing the tenant a certain sum for poor rates on the tithes, the second entry was rejected on the ground that it was not directly connected with the first item, though made about the same time.

§ 681.[5] In order that declarations against interest should be

extreme verge of the law. See, also, May. of Exeter *v.* Warren, 1844, 5 Q. B. 801.

[1] See Musgrave *v.* Emmerson, 1847, 16 L. J. Q. B. 174.

[2] Per Ld. Lyndhurst, in Rudd *v.* Wright, 1832, 1 Ph. Ev. 240. At one time doubts were unquestionably entertained on the subject. See Bullen *v.* Michael, 1816, 4 Dowl. 297.

[3] Doe *v.* Beviss, 1849, 18 L. J. C. P. 128; Whaley *v.* Carlisle, 1866, 17 Ir. C. L. R. 792. And see The "Swiftsure," 1900, 82 L. T. 389.

[4] Knight *v.* Marquis of Waterford, 1840, 10 L. J. Ex. Eq. 57 (Alderson, B.). The learned judge added that if the amount charged had been explicitly stated to be a sum less than that deducted on the other side of the account, it might possibly have been admissible, on the authority of Stead *v.* Heaton, supra.

[5] Gr. Ev. § 153, in part.

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§§ 681, 682.

admissible, it is not necessary[1] that the declarant should have been competent, if living, to testify to the facts it asserts.[2] Neither, as regards the *admissibility* of declarations, is it material that the matters stated therein are provable by living witnesses who might have been called.[3] Moreover, no objection can be taken to an account, in which a deceased agent charges himself with the receipt of money, on the ground that it does not appear by the account itself for whom the sums were received; provided it can be shown aliundè that they were in fact collected for a third person.[4]

§ 682. Accounts will be received in evidence, as being declarations of a deceased person charging himself, if they were written by him either wholly[5] or in part,[6] though they were not signed; or if they were signed by him, though they were written by a stranger.[7] So they will also be, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorised agent,[8] or if that fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in at an audit.[9] Nor does it signify in such a case whether the party who actually wrote the accounts be alive or dead at the time of the trial, though, if he be alive, his non-production may be matter of observation.[10] If, however, no proof can be given that the account was either written, or signed, or authorised, or adopted, by the deceased person made chargeable thereby, it cannot be received. Therefore, a rental, in which a deceased steward was debited with certain receipts, written by a party since dead, styling himself clerk to such steward, was not received as a declaration against the interest of the steward, no

[1] Formerly it was thought otherwise. See Higham *v.* Ridgway, 1808, 10 East, 109.

[2] Gleadow *v.* Atkin, 1833, 2 L. J. Ex. 153; Short *v.* Lee, 1821, 2 Jac. & W. 464.

[3] Middleton *v.* Melton, 1829, 10 B. & C. 322; ante, § 641.

[4] Rowe *v.* Brenton, 1828, 8 B. & C. 737.

[5] Id.

[6] Doe *v.* Colcombe, 1841, C. & Marsh. 155.

[7] Doe *v.* Stacey, 1833, 6 C. & P. 139.

[8] Bradley *v.* James, 1853, 22 L. J. C. P. 193.

[9] Doe *v.* Hawkins, 1841, 10 L. J. Q. B. 285; Doe *v.* Mobbs, 1841, Car. & M. 1; May. of Exeter *v.* Warren, 1844, 5 Q. B. 801; Att.-Gen. *v.* Stephens, 1855, 25 L. J. Ch. 888 (Wood, V.-C.).

[10] Doe *v.* Hawkins, 1841, 10 L. J. Q. B. 285.

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§§ 682, 683.

parol evidence having been given to show that he ever employed the writer to make the entries: and it was equally inadmissible as made against the interest of the clerk, because it did not purport to charge *him*.[1] After the lapse of thirty years, the handwriting of an account need not be proved, provided the book containing it be produced from the proper custody.[2]

§ 683.[3] Where the evidence consists of entries made by persons acting for others, as agents, stewards, or receivers, *some proof of such agency* is generally required, previously to their admission. Where, indeed, the office is *public* and must exist, the law will presume that a person who acts in it has been regularly appointed. But where it is merely *private*, preliminary and independent evidence must in general be adduced of its existence, and of the appointment of the particular agent or incumbent.[4] Even the antiquity of the book containing the entry does not, per se, afford sufficient ground for dispensing with this preliminary proof. Therefore entries have been rejected for want of it, though they were apparently made as much as fifty, seventy, and in one case, even one hundred and sixty years before the trial.[5] Bayley, B., in rejecting an entry bearing date 1673, observed, "The character of the evidence must be established before the entry is read you cannot read it to show the position of the party making it; that must be proved aliundè."[6] Sir Thomas Plumer, M.R., said, with reference to a book seventy years old, purporting to have been kept by a tithe collector named Beale, "If the writings of persons not invested with the proper characters were received, nothing could be more dangerous to property. Suppose that Beale was not the person authorised to collect the tithes, but nevertheless had for some purpose made these entries; then, if after his death the book purporting to be a collector's book was to be evidence to prove that he was collector, and his being collector was to prove the entries to

[1] Baron de Rutzen *v.* Farr, 1835, 4 A. & E. 53.

[2] Wynne *v.* Tyrwhitt, 1821, 4 B. & Ald. 376; May. of Exeter *v.* Warren, 1844, 5 Q. B. 801; Doe *v.* Michael, 1851, 17 Q. B. 276; Att.-Gen. *v.* Stephens, 1855, 25 L. J. Ch. 888.

[3] Gr. Ev. § 154, in part.

[4] Short *v.* Lee, 1821, 2 Jac. & W. 464.

[5] Manby *v.* Curtis, 1815, 1 Price, 225; Short *v.* Lee, 1821, 2 Jac. & W. 464; Davies *v.* Morgan, 1831, 1 C. & J. 587.

[6] Davies *v.* Morgan, 1831, 1 C. & J. 587.

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§§ 683, 684.

be correct, the consequence would be, that the rights of the rector on the one hand, or those of the parishioners on the other, would be exposed to the greatest danger, and perhaps from the writings of a person having a contrary interest."[1] If, however, ancient books come from the proper repository, slight proof of the official character of the writer will usually be sufficient to warrant their admission. If, too, such documents contain strong *internal* evidence of their actually being what they purport to be, they may, it seems, on that ground alone, be submitted to the jury.[2]

§ 684. Declarations against *proprietary interest* include statements made by persons while in possession of land, explanatory of the character of their possession. Such declarations, *if made in disparagement of the declarant's title*, are receivable, not only as original admissions against himself and all persons who claim title through him,[3] but also as evidence for or against strangers.[4] Whether in this latter event they are admissible in the lifetime of the declarant, or only in cases where his death can be proved, has not been distinctly decided. In most of the cases where the evidence has been received the declarant was dead;[5] but on two occasions, at least, the evidence was admitted, though the declarant was living.[6] These declarations can, it is said, only

[1] Short *v.* Lee, 1821, 2 Jac. & W. 464.

[2] Doe *v.* Thynne, 1808, 10 East, 206; Brune *v.* Thompson, 1841, 11 L. J. Q. B. 131; May. of Exeter *v.* Warren, 1844, 5 Q. B. 801; Doe *v.* Michael, 1851, 17 Q. B. 276; Att.-Gen. *v.* Stephens, 1855, 25 L. J. Ch. 888. See ante, § 612.

[3] Ld. Trimlestown *v.* Kemmis, 1843, 9 Cl. & Fin. 763 (H. L.); Doe *v.* Pettett, 1821, 5 B. & Ald. 223; Doe *v.* Austin, 1832, 9 Bing. 41. For American authorities, see West Cambridge *v.* Lexington, 1824, 2 Pick. 536; Little *v.* Libby, 1823, 2 Greenl. 242; Rankin *v.* Tenbrook, 1837, 6 Watts, 388; Jackson *v.* Bard, 1809, 4 Johns. 230; Weidman *v.* Kohr, 1818, 4 Serg. & R. 174; Gibblehouse *v.* Strong, 1832, 3 Rawle, 437; Davies *v.* Campbell, 1841, 1 Iredell, 482; Crane *v.* Marshall, 1839, 4 Shepl. 27.

[4] Carne *v.* Nicoll, 1835, 1 Bing. N. C. 430; Doe *v.* Langfield, 1847, 16 M. & W. 497; Doe *v.* Jones, 1808, 1 Camp. 367; Davies *v.* Pierce, 1787, 2 T. R. 53; Doe *v.* Rickarby, 1803, 5 Esp. 4; Peaceable *v.* Watson, 1811, 4 Taunt. 16; Doe *v.* Coulthred, 1837, 7 A. & E. 235; Garland *v.* Cope, 1848, 11 Ir. L. R. 514; Mountnoy *v.* Collier, 1853, 22 L. J. Q. B. 124; Gery *v.* Redman, 1875, 1 Q. B. D. 161.

[5] Carne *v.* Nicoll, 1835, 1 Bing. N. C. 430; Doe *v.* Jones, 1808, 1 Camp. 367; Davies *v.* Pierce, 1787, 2 T. R. 53; Peaceable *v.* Watson, 1811, 4 Taunt. 16; Doe *v.* Coulthred, 1837, 7 A. & E. 235; Doe *v.* Pettett, 1821, 5 B. & Ald. 223.

[6] Walker *v.* Broadstock, 1795, 1 Esp. 458; Doe *v.* Rickarby, 1803, 5 Esp. 4. In Papendick *v.* Bridgwater, 1855, 24 L. J. Q. B. 289, Walker *v.* Broadstock was denied to be law.

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be receivable during the declarant's lifetime as being statements accompanying acts of possession, and as such constituting part of the res gestæ. This argument, however, proves too much, as it would let in all declarations of the occupier, whether in disparagement or in *support* of his title; an extension of the rule which (however consistent it may be with principle), is certainly not warranted by judicial decisions.[1] Such declarations ought to be regarded as only receivable when the declarant is dead, but as then being good primary evidence;[2] and as then admissible simply on the ground that they were made against the interest of a deceased declarant.[3]

§ 685. Possession is, however, primâ facie evidence of seisin in fee simple.[4] Consequently, any declaration by a person in possession that he is tenant in tail, or for life, or for years, or by sufferance, as it makes strongly against his own interest, may safely be received in evidence, on account of its probable truth,[5] whether such declaration be made verbally,[6] or in writing,[7] or by deed,[8] or by will (even an unproved),[9] or in a statement of defence to an action.[10] But it must relate to matters, either within the declarant's own knowledge, or on which he has himself formed an opinion; and therefore a statement of defence, narrating what the declarant has heard *another person state* respecting his title, is not admissible to defeat his estate—at least if he does not add that he believes such statement to be true.[11]

[1] See Doe *v.* Wainwright, 1838, 8 A. & E. 700.

[2] Doe *v.* Langfield, 1847, 16 M. & W. 497.

[3] In Phillips *v.* Cole, 1839, 10 A. & E. 106, Ld. Denman, in pronouncing the judgment of the court, says: "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interests of those who make them."

[4] Ante, § 123.

[5] Chambers *v.* Bernasconi, 1831, 3 L. J. Ex. 373; Peaceable *v.* Watson, 1811, 4 Taunt. 16; Crease *v.* Barrett, 1835, 4 L. J. Ex. 297; Doe *v.* Langfield, 1847, 16 M. & W. 497.

[6] Carne *v.* Nicoll, 1835, 1 Bing. N. C. 430; Baron de Bode's case, 1845, 8 Q. B. 245; R. *v.* Birmingham, 1861, 31 L. J. M. C. 63; R. *v.* Exeter, 1869, L. R. 4 Q. B. 341.

[7] Doe *v.* Jones, 1808, 1 Camp. 367; R. *v.* Exeter, 1869, L. R. 4 Q. B. 341.

[8] Doe *v.* Coulthred, 1837, 7 A. & E. 235; Garland *v.* Cope, 1848, 11 Ir. L. R. 514; Sly *v.* Sly, 1877, L. R. 2 P. D. 91.

[9] O'Sullivan *v.* Burke, 1875, Ir. R. 9 C. L. 105.

[10] Ld. Trimlestown *v.* Kemmis, 1843, 9 Cl. & Fin. 763 (H. L.).

[11] Ld. Trimlestown *v.* Kemmis, 1843, 9 Cl. & Fin. 763 (H. L.), by the Lds., confirming the unanimous opinion of the judges.

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§§ 686, 687.

§ 686. It is difficult to fix with precision how far declarations against interest are evidence of the facts contained in them. They have been received to show the name of the landlord under whom,[1] and the identity of the will under which,[2] the declarant held; the amount of rent that was paid;[3] the fact of the payment of rent;[4] the extent of the tenement that was occupied;[5] and the fact that it was freehold and not copyhold.[6] Indeed, the courts seem now inclined to admit such declarations not only as proof of the interest which the declarant enjoys in the premises, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it.[7] In all cases in which it is sought to give evidence of a declaration on the ground that it was a *declaration against* proprietary interest, it must, however, be proved that the declarant was actually in possession of the land in question; since otherwise his declaration that he has a limited interest therein may be regarded in the light rather of a statement in his own favour than of one against his interest.[8] Still, slight evidence on this head will suffice.[9] Therefore, where a person was seen felling timber in a wood, this act of his—though probably he was in fact a mere labourer—was held to be a sufficient assertion of ownership to raise a presumption that he was possessed of the fee, and, consequently, to let in any statement made by him as to who was the actual proprietor.[10]

§ 687. In applying the rule that declarations *against proprietary interest* are admissible, care must be taken to distinguish between statements made by an occupier of land in disparagement of his own title, and such declarations as merely go to abridge or incumber the property itself. The former are receivable, but the latter will be rejected. For instance, a statement by an

[1] Peaceable *v.* Watson, 1811, 4 Taunt. 16; Holloway *v.* Rakes, 1772, cited by Buller, J., in Davies *v.* Pierce, 1787, 2 T. R. 53; Doe *v.* Green, 1820, Gow, R. 227.

[2] Sly *v.* Sly, 1877, L. R. 2 P. D. 91.

[3] R. *v.* Birmingham, 1861, 31 L. J. M. C. 63.

[4] R. *v.* Exeter, 1869, L. R. 4 Q. B. 341.

[5] Mountnoy *v.* Collier, 1853, 22 L. J. Q. B. 124.

[6] Doe *v.* Jones, 1808, 1 Camp. 367.

[7] R. *v.* Birmingham, 1861, 31 L. J. M. C. 63.

[8] See Crease *v.* Barrett, 1835, 4 L. J. Ex. 297.

[9] La Touche *v.* Hutton, 1875, 9 Ir. Eq. R. 166.

[10] Doe *v.* Arkwright, 1833, 5 C. & P. 575.

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occupier that he is only tenant for life, will, after his death, be admissible evidence against a stranger; but an admission by him that property was intersected by a public highway, or that a neighbour had an easement over it, or that he was not entitled to common of pasture in respect of it, will only bind himself and those who claim under him, and will not be admissible as against his landlord or a stranger.[1] The grounds for this distinction are obvious. It is scarcely possible to imagine any inducement which will lead a person possessed of premises in fee to admit that he is only a tenant. But many reasons might induce a tenant to acknowledge the existence of an easement or a highway, —especially where it was either not inconvenient, or even absolutely beneficial to him;[2] a tenant, about to remove from one farm to another, might, for example, readily feel an interest in denying the existence of rights attached to the farm he was leaving, with the view of increasing the value of those which belonged to that which he was entering.[3]

§ 688. Entries contained in the *books of deceased rectors or vicars* have long been admitted as evidence *in favour of their successors*.[4] The admissibility of this class of entries is differently viewed. Some persons regard it as altogether anomalous.[5] Others look upon it as justified by the same principle as makes the rule which admits old leases, rent-rolls, surveys, &c., admissible.[6] Others, again, consider that it falls within the same principle, viz., the extreme improbability of falsehood, which renders declarations against interest admissible evidence. At any rate[7] "it is now the settled law of the land. *It is not to be presumed, that a person, having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage.*"[8] The rule extends to admit the books of ecclesiastical

[1] R. *v.* Bliss, 1837, 7 L. J. Q. B. 4; Scholes *v.* Chadwick, 1843, 2 M. & Rob. 507; Tickle *v.* Brown, 1836, 4 A. & E. 378; Papendick *v.* Bridgwater, 1855, 24 L. J. Q. B. 289; and see Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121.

[2] See R. *v.* Bliss, 1837, 7 L. J. Q. B. 4; Daniel *v.* North, 1809, 11 East, 375.

[3] Papendick *v.* Bridgwater, 1855, 24 L. J. Q. B. 289.

[4] See Daly *v.* Wilson, 1842, Milw. 658 (Ir.); Young *v.* Clare Hall, 1851, 21 L. J. Q. B. 12.

[5] Outram *v.* Morewood, 1793, 3 East, 346.

[6] Stobart *v.* Dryden, 1836, 5 L. J. Ex. 218.

[7] 1 Ph. Ev. 308, 309.

[8] Short *v.* Lee, 1821, 2 Jac. & W. 464.

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§§ 686—690.

corporations aggregate,[1] and, as it would seem, those also of lay impropriators in fee. With regard, however, to these last, it would certainly be open to considerable suspicion, since a lay impropriator in fee, having a permanent interest to advance, might possibly be induced to make evidence for his heirs.[2]

§ 689. Though, however, the law admits such entries by deceased persons in ecclesiastical books as evidence, juries will do well not to place implicit reliance on them. Moreover, although general observations have sometimes been made which appear to authorise the admission of any kind of statement contained in such books, they must, nevertheless, be rejected unless the entries contain receipts of money or ecclesiastical dues, or are, in other respects, apparently prejudicial to the pecuniary or proprietary interests of the makers.[3] And further, as in other cases, proof will be required that the writer was authorised to receive the money stated, and that he is actually dead; and that the document has come from the proper custody.[4]

§ 690. The improbability of falsehood is again probably the principle[5] upon which the *indorsement* by the payee of the *payment of interest*, or of *part payment* of the principal, on a bond, bill of exchange, or other negotiable security, might, under the old law, be given in evidence by *his representatives* after his death, in order to bar the Statute of Limitations, or to rebut the presumption of payment that would otherwise have arisen from lapse of time. Accordingly, where such indorsement was shown to have been made before the creditor's remedy was impaired by lapse of time, it was admissible evidence of an acknowledgment;[6] if after that period, it was rejected.[7] As to how the time at which the indorsement was made can be proved is a point upon which much contrariety of opinion has prevailed.[8]

[1] 1 Ph. Ev. 476—479.

[2] Id. 479, 480, and cases there cited.

[3] 1 Ph. Ev. 303; Ward *v.* Pomfret, 1832, 2 L. J. Ch. 22.

[4] Gresl. Ev. 224; Carrington *v.* Jones, 1824, 2 Sim. & St. 135; Perigal *v.* Nicholson, 1810, Wightw. 63.

[5] But at least one eminent writer upon the law of evidence treats this class of cases in connection with entries made in the course of business: 1 Ph. Ev. 330—335.

[6] Searle *v.* Ld. Barrington, 1728, 2 Str. 826; Bosworth *v.* Cotchett, 1824, 1 Ph. Ev. 300.

[7] Newbould *v.* Smith, 1889, 14 App. Cas. 423 (H. L.); Turner *v.* Crisp, 1728, 2 Str. 827; Glynn *v.* Bk. of England, 1750, 2 Ves. Sen. 38; Briggs *v.* Wilson, 1853, 5 De G. M. & G. 12.

[8] See cases referred to, post, §§ 693—696.

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§ 691. Now, however, so far as *notes*, *bills*, and other writings subject to the operation of the Statute of Limitations,[1] are concerned, Lord Tenterden's Act[2] enacts, that "no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statute."[3] An attempt was once made in an action by the executors of the payee of a promissory note, to extend this salutary provision beyond its legitimate limits. The plaintiffs, to defeat the Statute of Limitations, having tendered in evidence a book, in which the maker of the note had himself, by the direction of the testator, entered two payments of interest, as having been made to the testator by the defendant within the last six years, they were objected to, on one ground, that their receipt in evidence would violate the spirit, if not the words, of the enactment just cited. But the objection was overruled.[4]

§ 692. With respect, moreover, to *bonds* and other *specialties*, a modern statute[5] has rendered nugatory the old doctrine of presumption of payment from lapse of time generally, by enacting that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognisance, &c., shall be commenced and sued within twenty years after the cause of such actions or suits; though the Act in question contains[6] a proviso, that, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon,[7] the person entitled to such

[1] 21 J. 1, c. 16 ("The Limitation Act, 1623").

[2] 9 G. 4, c. 14, § 3.

[3] As to the Irish Law, see 16 & 17 V. c. 113, §§ 20—24.

[4] Bradley *v.* James, 1853, 22 L. J. C. P. 193.

[5] 3 & 4 W. 4, c. 42, § 3.

[6] In § 5, as to which see post, §§ 1090, 1091.

[7] In Roddam *v.* Morley, 1857, 26 L. J. Ch. 438, payment of interest on a bond by the tenant for life of certain land under the will of the obligor, was held to prevent this statute from barring the action against the heirs and devisees in remainder, after the expiration of twenty years from the time of the bond becoming due; and in Re Hollingshead, 1888, 37 Ch. D. 651, payment of interest on a promissory note of a testator by the tenant for life of his real assets was held to

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§§ 692, 693.

action may bring it for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid; and the plaintiff may, by way of reply, state such acknowledgment, and that such action was brought within the time aforesaid in answer to a plea of the statute.[1] The Act contains, however, no clause corresponding with the provision in § 3 of Lord Tenterden's Act, which has just been set out. It therefore seems clear that,—provided the point be properly raised by the pleadings,—the acknowledgment of the debt afforded by the payment of interest or part payment of principal may, in the case of bonds and other specialties, be still proved in the same manner as formerly; that is, by producing the document and showing that it bears indorsements of such payments, even though these indorsements were written or adopted by the creditor himself, through whom the plaintiff claims. The only difference between the old and new law is, that, whereas this evidence was formerly admissible in answer to a plea of payment, it is now received in support of a reply setting up an acknowledgment by the defendant, where the original demand has been met by a plea of the statute.

§ 693. It consequently may still become important to determine to what extent and in what manner it is necessary to adduce proof as to the time when an indorsement tendered in evidence to prove payment of interest or part payment of principal was written. Now, the whole system of admitting such indorsements in favour of parties *in privity* with the persons making them, is an anomaly which cannot be supported by any of the reasons whereon the admissibility of rectors' books is made to rest,[2] and which, so far as regards parol instruments, has been expressly rejected by the Legislature.[3] And such indorsements are only admissible on the highly technical ground that they were, at the time they were made, *entries against the interest* of the person making them, since his right was at that time unaffected by any Statute of

prevent the statute barring the debt against the assets in the hands of the remainderman. See Pears *v.* Laing, 1871, L. R. 12 Eq. 41 (Bacon, V.-C.). But see Coope *v.* Cresswell, 1866, L. R. 2 Ch. 112; and Dickenson *v.* Teasdale, 1862, 32 L. J. Ch. 37.

[1] As to Irish Law, see 16 & 17 V. c. 113, §§ 20—24.

[2] Ante, § 688.

[3] 9 G. 4, c. 14, § 3.

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Limitations. Under these circumstances it is not unreasonable to contend, that the courts should require strict proof of the time when the indorsements were really made, before admitting them in evidence. In ordinary cases, the law may safely presume that a document was written at the time it bears date. An exception to this general rule was recognised,[1] under the old law of bankruptcy, in cases where a note signed by a bankrupt was put in by his assignees to support the petitioning creditor's debt, and it was required that the date of the instrument should be *proved*. The grounds applicable in this case would appear to apply equally to the indorsements under discussion,[2] which, if really made *within* twenty years from the date of the bond, are received (because being in such case against the interest of the obligee, they are presumed to be true); but, if made *beyond* the twenty years, are rejected (because, after the lapse of that time, it would be so obviously to the advantage of the obligee to revive, by their means, the remedy barred by the statute). It is as easy to fabricate a date as to fabricate an indorsement, of which the date forms part, and it would be a strange mode of checking such fraudulent practices to say to an obligee, "Your remedy on the bond is barred by the statute, and therefore if you now indorse upon it any admission that you have received some interest from the obligor, no credit, after your death, will be given to such admission; but carry on your deceit one step further, and add to your indorsement a date, which will give it the semblance of having been made while your remedy was unimpaired, and then, at your death, your representatives may recover against the obligor." For these reasons it is submitted that evidence outside the instrument itself may reasonably be required. Indeed, to throw on a defendant the burthen of proving negatively that an indorsement or an instrument was not written on the day of the date, is in fact to shut the door upon all inquiry into the matter; because, as the note continued in the hands of the payee or his representatives, it was scarcely possible for the maker to ascertain at what time any indorsement was written upon it.

§ 693.

[1] Ante, § 169. See, also, another exception noticed ante, §§ 169, 582.

[2] See Potez *v.* Glossop, 1848, 2 Ex. 191.

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§§ 694—696.

§ 694. The authorities cannot be said, however, to lay down any decisive rule on the point.[1] A case in the House of Lords[2] is usually cited[3] as an authority against the view above contended for. But that case is not reported, and is noticed so shortly by text writers[4] that the grounds of the decision cannot be ascertained. In another,[5] extrinsic evidence *was* apparently given of the time when the indorsements were made, though only one reporter (Mr. Brown) mentions it;[6] and he in but a loose way. In a third case,[7] in addition to an indorsement signed by the obligee, a witness was called, who proved actual payment of the interest. In yet another,[8] the payment of interest by the obligor to a stranger was proved; and many circumstances concurred to show that the indorsement relied upon by the plaintiffs was written on or about its alleged date, and, moreover, it signified little when it was written, as it was equally against the interest of the obligee at all times.[9]

§ 695. The strongest case against the view above contended for is a Nisi Prius ruling[10] in which an indorsement upon a promissory note of the receipt of interest thereon (dated previously to the statute) was admitted without any extrinsic proof of the time when it was actually written; the judge observing, that, "in the absence of all evidence to the contrary, he should assume that it was written at the time it bore date." This case has been cited with approbation by the Court of Common Pleas,[11] and by Lord Justice Turner on a more recent occasion,[12] as supporting the general doctrine that documents are presumed to have been written at the time when they bear date.

§ 696. The view taken in the present work that evidence of

[1] Per Bayley, B., in Gleadow *v.* Atkin, 1833, 2 L. J. Ex. 153; 2 L. J. Ex. 153, stating the result of his own researches.

[2] Bosworth *v.* Cotchett, 1824, 1 Ph. Ev. 300 (H. L.).

[3] Per Vaughan, B., in Gleadow *v.* Atkin, 1833, 2 L. J. Ex. 153. His lordship was counsel in Bosworth *v.* Cotchett, 1824.

[4] 1 Ph. Ev. 333; 3 St. Ev. 824. In this last work the case is cited as Parr *v.* Cotchett.

[5] Searle *v.* Lord Barrington, 1728, 2 Str. 826.

[6] 3 Br. P. C. 594, where the reporter says that "other circumstantial evidence" was given to prove that the bond had not been satisfied.

[7] Sanders *v.* Meredith, 1828, 3 M. & Ry. 116.

[8] Gleadow *v.* Atkin, 1833, 2 L. J. Ex. 153.

[9] See per Bayley, B., id.

[10] Smith *v.* Battens, 1834, 1 M. & Rob. 341.

[11] In Anderson *v.* Weston, 1840, 6 Bing. N. C. 296.

[12] Briggs *v.* Wilson, 1853, 5 De G. M. & G. 12.

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date, other than that afforded by the instrument itself, must be given, is, however, supported by the language of Lord Ellenborough,[1] where, in refusing to admit in evidence a certain indorsement, the date of which was not proved, but which displaced evidence already given on the other side, his lordship said, "I think you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. * * * If such indorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest."

§ 696A. Perhaps the safest rule that can be laid down on this subject is, that if the indorsement *appear by its date* to have been written within the twenty years, the question may be left to the jury, under all the circumstances of the case, whether it were *really* so written;[2] the law raising no presumption either way. In equity, however, the fact is one for the judge to determine.[3]

[1] Rose *v.* Bryant, 1809, 2 Camp. 321.

[2] See per Vaughan, B., in Gleadow *v.* Atkin, 1833, 2 L. J. Ex. 153.

[3] See Newbould *v.* Smith, 1889, 14 App. Cas. 423 (H. L.).

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CHAPTER VII.

DECLARATIONS IN THE COURSE OF OFFICE OR BUSINESS.

§§ 697, 698.

§ 697. THE class of cases which forms the FIFTH EXCEPTION to the general rule, that hearsay evidence must be rejected,[1] consists of declarations by deceased persons *in discharge of duty in the ordinary course of business or professional employment.* The rule is very commonly, but inaccurately, stated to be that all entries "made in the ordinary course of business" are admissible. But this is not so, and entries gratuitously made by a man, even in the ordinary course of business, merely for his own satisfaction, and not in the discharge of any *duty*, will not be admissible in evidence after his death.[2] The considerations which have induced the courts to recognise this exception appear to be principally these:—that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of duty are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of duty are usually subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.[3]

§ 698.[4] One of the earliest cases,[5] illustrative of this subject,

[1] It will be recollected that there are six such exceptions. See ante, § 607.

[2] See Hope *v.* Hope, 1893, W. N. 20 (C. A.).

[3] Pool *v.* Dicas, 1835, 2 L. J. C. P. 47; 1 Ph. Ev. 319; 1 St. Ev. 348, 349.

[4] Gr. Ev. § 116, in part.

[5] Price *v.* Torrington, 1703, 1 Salk.

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§§ 698, 699.

was an action for beer sold and delivered. The plaintiff was a brewer, and to prove the delivery it was shown that, in the usual course of plaintiff's business, it was the duty of his draymen to come every night to the clerk of the brewhouse, and give him an account of the beer delivered during the day, which he entered in a book kept for that purpose, to which the draymen set their hands. An entry in this book, stating the delivery of the beer in question, and signed by a drayman, whose signature and death were proved, was put in, and was held to be sufficient evidence to maintain the action. This decision has since been followed in many cases. For example the service of a notice to quit has been held, after his death, to be sufficiently proved by the indorsement of service upon a copy of the notice, made by the attorney who served it; it being shown to be the ordinary course of business in his office to preserve copies of such notices, and to indorse the service thereon.[1]

§ 699. Similarly, it has been held that a payment of rates is sufficiently shown by an entry of the receipt of rates made in his book by a deceased clerk of a collector, who had been duly appointed;[2] that the dishonour of a bill of exchange by the acceptor, and notice thereof to the indorser, is proved by entries in the books of the messenger of a bank, and of the clerk of a notary, shown to have been made in the usual routine of business;[3] and, upon like proof, proof of a letter having been sent, and (after notice to the other side to produce it) of its contents, is afforded by the letter-book of the plaintiff, a merchant, in which a deceased clerk had inserted what purported to be the copy of a letter to the defendant, and had further made a memorandum stating that he had sent such letter.[4] On the

285; 1 Sm. L. C. 277. See, also, Pitman *v.* Maddox, 1698, 2 Salk. 690; Rowcroft *v.* Basset, 1802, Peake, Add. Cas. 199.

[1] Doe *v.* Turford, 1832, 1 L. J. K. B. 262; R. *v.* Cope, 1835, 7 C. & P. 726; R. *v.* Dukinfield, 1848, 17 L. J. M. C. 113; Stapylton *v.* Clough, 1853, 23 L. J. Q. B. 5.

[2] R. *v.* St. Mary, Warwick, 1853, 22 L. J. M. C. 109.

[3] Sutton *v.* Gregory, 1797, Peake, Add. Cas. 150; Poole *v.* Dicas, 1835, 2 L. J. C. P. 47; Nichols *v.* Webb, 1823, 8 Wheat. 326 (Am.); Welch *v.* Barrett, 1819, 15 Mass. 380 (Am.); Halliday *v.* Martinett, 1822, 20 Johns. 168 (Am.); Butler *v.* Wright, 1829, 2 Wend. 369 (Am.); Hart *v.* Williams, 1829, 2 Wend. 513 (Am.); Nicholls *v.* Goldsmith, 1831, 7 Wend. 160 (Am.).

[4] Pritt *v.* Fairclough, 1812, 3 Camp. 305; Hagedorn *v.* Reid, 1813, 3 Camp. 379. See, also, Champneys *v.* Peck, 1816, 1 Stark. 404; Doe *v.*

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§§ 699, 700.

same principle, where a police-constable had, in the course of his *duty*, made a verbal report to his inspector, stating where he was going and what he was about to do, proof of such report was held to be admissible evidence for the Crown on the trial of an indictment charging the prisoner with the murder of the policeman.[1]

§ 700. Of late years, great *disinclination* has been evinced by the courts to extending the principle of allowing entries which have been made in pursuance of duty in the ordinary course of business to be admitted as evidence further than the decisions have already carried it.[2] Accordingly, it has (as already mentioned) been held that, to be admissible, an entry by a deceased person must have been made in pursuance of some *duty*.[3] It has further been held necessary that the person who made such entry should not only have done so in the course of some *duty*, but should also have had personal knowledge of the statements contained therein.[4] In accordance with this latter principle, in an action[5] for the price of coals sold at the pit's mouth, an entry, made in the following manner, was rejected. In ordinary course, it was the duty of one of the workmen at the pit to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ one Baldwin to make entries in the books from his dictation, and Baldwin read them over every evening to the foreman. The foreman and the workman,

Langfield, 1847, 16 M. & W. 497; East Union Ry. Co. *v.* Symonds, 1850, 5 Ex. 237. But see Rowlands *v.* De Vecchi, 1882, Cab. & E. 10.

[1] R. *v.* Buckley, 1873, 13 Cox, C. C. 293.

[2] See Doe *v.* Skinner, 1848, 18 L. J. Ex. 107; Smith *v.* Blakey, 1867, L. R. 2 Q. B. 326; The Henry Coxon, 1878, L. R. 3 P. D. 156; Massey *v.* Allen, 1879, 13 Ch. D. 558.

[3] Hope *v.* Hope, 1893, W. N. 20 (C. A.), where it is pointed out that the case of Rawlins *v.* Rickards, 1860, 28 Beav. 370 (in which it was held that an entry by a deceased solicitor in his diary, noting the fact of his having attended a client on a certain day on her executing a deed of appointment was admissible in evidence), is of very doubtful authority, since it is extremely hard to see in that case what *duty* the solicitor was under to make the entry. Field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed have been held not to be entries made in the discharge of professional duty: Mellor *v.* Walmesley, [1904] 2 Ch. 525 (Swinfen Eady, J.); see also Bright *v.* Legerton, 1860-1, 30 L. J. Ch. 338, and Kerin *v.* Davoren, 1861, 12 Ir. Ch. R. 352.

[4] Ryan *v.* Ryan, 1889, 25 L. R. Ir. 185.

[5] Brain *v.* Preece, 1843, 11 M. & W. 773.

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whose duty it was to give notice to him, being both dead at the time of the trial, Baldwin was called to produce the book, to prove thereby the delivery of the coal in question. Such book was, however, held inadmissible, since the entries, although, having been made under the foreman's direction, they might be regarded as made by him, as such foreman had no *personal knowledge* of the facts stated in them, but derived his information at second-hand from the workman, did not possess the same guarantee for the truth of the entries as existed in the cases establishing the principle of receiving entries by a deceased person in the usual course of business,—in all of which cases the party making the entry had himself done the business, a memorandum of which he had inserted in his book.

§ 701. Where, to show that a Jew was of age, it was proved that Jewish children are usually circumcised on the eighth day from their birth, and that it belongs to the office of the chief Rabbi to perform this rite, and to make an entry thereof in a book kept at the synagogue, and upon proof that the Rabbi was dead, this book was tendered in evidence, it was rejected, probably on the ground (none is stated in the report) that there was no legal *duty* to make the entry;[1] while in another case,[2] an entry made by a deceased employer in a book in which he had in the course of his business been in the habit when hiring farm servants of always entering the time and terms of such hiring, was rejected. The decision in this last case was *expressly* (while, as we have seen, that in the case of the Rabbi was *probably*) on the ground that, although it might be the practice, it was not the *duty*, of the person who, in fact, generally did so, to make such entries.

§ 702. The Legislature itself has, in at least one instance, recognised and acted upon the exception under discussion.[3] For the statute, which regulates the Civil Bill Courts in Ireland,[4] enacts that "a book or books shall be kept by every officer

[1] Davis *v.* Lloyd, 1844, 1 C. & K. 276.

[2] R. *v.* Worth, 1843, 12 L. J. M. C. 47.

[3] *I.e.*, the exception to the general rule against admitting hearsay, which allows entries made by a deceased person in the course of his duty or business to be received as evidence.

[4] 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), § 19.

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§§ 702—704.

appointed for the service of process, in such form as shall be directed or approved by the chairman or assistant barrister, in which shall be entered the names of the plaintiff and defendant by or against whom any process shall be issued, the cause of action, the day on which such process shall be received to be served, the day on which such process shall be served or executed, the place where, and the name or description of the person on or with whom, such process shall be served or left, and in case any such process shall not have been duly served or left, then the cause of such service not having been effected shall be stated; and each and every process-officer shall attend, and produce such book or books to the chairman or assistant barrister, at each and every sessions of the peace, or shall cause such book or books to be produced to such chairman or barrister in case of the *unavoidable absence* of such process-officer; and in case of the *death, illness,* or such *absence* as aforesaid of any such process-officer, the book or books of such process-officer, kept by him as aforesaid, verified on oath as to his handwriting by some credible person, shall be produced at the sessions, and shall there be primâ facie evidence of the truth of the several matters entered therein as aforesaid."

§ 703. The rules which regulate the reception of entries as made by a deceased person in the regular course of business, are, in many respects, the same as those which prevail with respect to declarations against interest. For instance, the death,[1] the handwriting, and the official character,[2] of the person who made the entry must be proved; and it should further appear that he had no motive to misstate. In some other particulars, however, a marked distinction exists between the two classes of cases.

§ 704. In the first place, to render entries made in the course of office or business admissible, they must—unlike declarations against interest—be proved to have been made *contemporaneously with the acts to which they relate.*[3] "It is to be observed," said a learned judge, "that in the case of an entry against interest,

[1] See Cooper *v.* Marsden, 1793, 1 Esp. 1. See ante, § 669.

[2] Doe *v.* Wittcombe, 1851, 6 Ex. 601.

[3] Ryan *v.* Ryan, 1889, 25 L. R. Ir. 185; Doe *v.* Beviss, 1848, 18 L. J. C. P. 128; Doe *v.* Skinner, 1848, 18 L. J. Ex. 107.

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§§ 704, 705.

proof of the handwriting of the party, and of his death, is enough to authorise its reception; at whatever time it was made it is admissible: but in the other case (of an entry made in the course of business), it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry."[1] The word "contemporaneous," does not mean that the entry must have been made at the immediate time of the occurrence; but it will be sufficient if made within so short a time after as reasonably to be considered part of the transaction. Thus, if the business be done in the morning, and the entry be made in the evening of the same day,[2] or perhaps even on the following morning,[3] it will be sufficient. Where, however, several intermediate days had elapsed between the date of the transaction and the time of inserting an entry of it in the book, the evidence has been rejected;[4] and in one American case, the interval of a single day was held to constitute a valid objection.[5] The fact that the entry was made contemporaneously may, like any other fact, be established either by direct testimony, or by proof of any circumstances sufficient to raise a reasonable inference that such was the case.[6]

§ 705. Secondly, while declarations against interest are often admissible to prove *independent matters*, which, though forming part of the entry, are not in themselves against the interest of the declarant,[7] a stricter rule prevails with respect to official or business entries. For, "whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances."[8] Accordingly, a certificate of a deceased sheriff's officer, which had been returned

[1] Parke, B., in Doe *v.* Turford, 1832, 3 B. & Ad. 890; approved by Park, J., in Poole *v.* Dicas, 1835, 2 L. J. C. P. 47.

[2] Price *v.* Torrington, 1703, 1 Salk. 285; Ray *v.* Jones, 1836; Curren *v.* Crawford, 1818, 4 Serg. & R. 3, 5.

[3] Ingraham *v.* Bockins, 1823, 9 Serg. & R. 285 (Am.).

[4] Forsythe *v.* Norcross, 1836, 5 Watts, 432 (Am.).

[5] Walter *v.* Bollman, 1839, 8 Watts, 544 (Am.). Contrà, in England, The Henry Coxon, 1878, 47 L. J. Adm. 83.

[6] East Union Ry. Co. *v.* Symonds, 1850, 5 Ex. 237.

[7] Ante, 667—679.

[8] Chambers *v.* Bernasconi, 1834, 3 L. J. Ex. 373. See, also, Percival *v.* Nanson, 1851, 21 L. J. Ex. 1; Polini *v.* Gray and Sturla *v.* Freccia, both reported 1879, 12 Ch. D. 411 (C. A.); 1881, 5 App. Cas. 623 (H. L.).

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§§ 705, 706.

by him to the office in the ordinary routine of his duty, and which specified, among other circumstances connected with the arrest, the *place* where it happened, was held not to be evidence to show the particular spot where the caption took place, that circumstance being a mere incident of the performance of the officer's duty.[1] "This decision turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact."[2]

§ 706. Some persons, indeed, have contended that the admissibility of entries made in the course of business is also subject to a third rule, which certainly does not apply to declarations against interest. Such supposed qualification has been alleged to be to this effect;—namely, that entries made in the course of office or business cannot be admitted, unless *corroborated by other circumstances which render it probable that the facts therein recorded really occurred.* The supposition that any such qualification exists apparently rests, partly, on a supposed dictum of Taunton, J.;[3] partly, on a misapprehension of the rule, adopted by Lord Wensleydale, that an entry made in the course of business is admissible "where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place";[4] and partly on the circumstance, that, in one or two of the later cases on the subject, confirmatory evidence has in fact been adduced, and its existence has been noticed by the court as tending to establish the correctness of the entry.[5] However, the existence of any such qualification is denied by Mr. Phillipps, who contends that, though corroborative

[1] Chambers *v.* Bernasconi, 1834, 3 L. J. Ex. 373.

[2] Pool *v.* Dicas, 1835, 2 L. J. C. P. 47 (Park, J.). See, also, id. (Tindal, C.J.).

[3] Doe *v.* Turford, 1832, 3 B. & Ad. 898, making his lordship say, "A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that * that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved: and here many such circumstances did appear." Mr. Phillipps suggests that the words, "the entry was made when," have probably been omitted by accident at the place marked with the star: 1 Ph. Ev. 324.

[4] Doe *v.* Turford, 1832, 3 B. & Ad. 897.

[5] Id.; Poole *v.* Dicas, 1835, 2 L. J. C. P. 47.

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evidence must naturally add to the *value* of entries, it cannot be deemed essential to their *admissibility*,[1] and this view is, it is submitted, the correct one.

§ 707. However this may be, the further contention that entries in the course of business will only be received when the nature of the case is such as to render better evidence unattainable, has, at all events, been expressly rejected, since "it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous. The rejection of the evidence which has been received, would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange."[2]

§ 708. To render an entry in the course of business, then, receivable in evidence, it must have been made contemporaneously with the matter to which it relates, and in the usual routine of business, by a person whose duty it was to make the whole of it,[3] who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead;[4] and, provided all the terms of this proposition be satisfied, it seems to be immaterial, excepting so far as regards the *weight* of the evidence, that more satisfactory proof might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere oral statement, which has never been reduced to writing.[5]

§§ 709–10.[6] In the United States the doctrine that entries fulfilling the above requirements are admissible in evidence has been extended to *entries made by the party himself* in his own shop-books;[7] at least, where they were evidently contemporaneous

1 Ph. Ev. 324. See R. *v.* Cope, 1835, 7 C. & P. 726.

2 Poole *v.* Dicas, 1835, 2 L. J. C. P. 47. The same rule prevails with respect to declarations against interest: ante, § 681.

3 Stapylton *v.* Clough, 1853, 23 L. J. Q. B. 5; Trotter *v.* Maclean, 1879, 13 Ch. D. 580. See, however, Miller *v.* Wheatley, 1890, 28 L. R. Ir. 144 (diss. O'Brien, J.).

4 See Doe *v.* Wittcomb, 1853, 4 H. L. C. 425 (H. L.); Miller *v.* Wheatley, supra.

5 Ante, § 672.

6 Gr. Ev. § 118, in part.

7 For the American statutes and decisions on the above subject, see

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§§ 709-10. with the facts to which they refer, and formed part of the res gestæ. Being the acts of the party himself, they are received with the greater caution; but still they may be seen and weighed by the jury. This doctrine is not in accordance with the principles of the English common law, as now understood,[1] but in the time of James I. it seems to have been regarded as sound. For in 1609 an Act was passed[2] "to avoid the double payment of debts," which clearly recognised a tradesman's shop-books as instruments of evidence on his behalf, since it provided that entries in them should not be evidence after the lapse of more than twelve months. This Act is no doubt, in practice, always treated by our courts of law as a dead letter. Yet it, in truth, is still unrepealed, and was in fact recognised and made perpetual by the Statute Law Revision Act, 1863,[3] which repealed a few words in it which had originally made it only temporary. It is therefore necessary that the original Act should be inserted in this place.[4] The reason for this no doubt largely is that, while the statute is never noticed, tradesmen's books may, by the common law, be referred to to what is technically called "refresh the memory." They thus, in effect, and for practical purposes, become evidence, though not technically so called, and not being technically "evidence," the prohibition against those which are more than twelve months old does not attach to them.[4]

notes to § 641 of the first three editions of this work; also notes to Gr. Ev. § 118; and Anchor Milling Co. *v.* Walsh, 1891, 32 Am. St. R. 600.

[1] Ellis *v.* Cowne, 1849, 2 C. & K. 719 (Wilde, C.J.). In Smyth *v.* Anderson, 1849, 18 L. J. C. P. 109, the plaintiff's books were tendered in evidence by him to show that he had, throughout a sale effected by means of an agent, debited the defendant as principal, but were rejected.

[2] 7 J. 1, c. 12.

[3] 26 & 27 V. c. 125.

[4] The statute of James I. is expressed in the curious language then current, and it is as follows:— "Whereas divers men of trades, and handicraftsmen, keeping shop-books, do demand debts of their customers upon their shop-books long time after the same hath been due, and when, as they have supposed, the particulars and certainty of the wares delivered to be forgotten, then either they themselves, or their servants, have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the said debt: (2.) And whereas divers of the said tradesmen and handicraftsmen, having received all the just debts due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suits of law enforced to pay the same debts again to the party that

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§ 711. Independently of all statutable sanction, our courts of equity have for years past, to a certain extent, acted upon the principle of admitting shop-books in evidence, in taking accounts in cases in which the vouchers have been lost.[1] And now, by R. S. C., 1883, the court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary accounts to be taken, and "may, either by the judgment or order directing the account to be taken, or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched; and in particular may direct that, in taking the account, the books of account in which the accounts in question have been kept shall be taken as primâ facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."[2] The powers of the court with reference to the production of documents and of entries in books or of copies of either have been also considerably enlarged by the R. S. C., 1897, as amended by R. S. C., July, 1902. Ord.

§ 711.

trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof, by writing or witnesses, of the said payments, that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payments: (3.) Be it therefore enacted by the authority of this present Parliament, that no tradesman or handicraftsman keeping a shop-book as is aforesaid, his or their executors or administrators, shall be allowed, admitted, or received, to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done. II. Provided always, that this Act, or anything herein contained, shall not extend to any intercourse of traffick, merchandizing, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due, or work done or to be done, between merchants and merchants, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchandize, but that for such things only they and every of them shall be in case as if this Act had never been made; anything herein contained to the contrary thereof notwithstanding."

[1] Lodge *v.* Prichard, 1853, 3 De G. M. & G. 906. See post, § 812.

[2] Ord. XXXIII. rr. 2, 3. See Lodge *v.* Prichard, 1853, 3 De G. M. & G. 906; Newberry *v.* Benson, 1854, 23 L. J. Ch. 1003; Ewart *v.* Williams, 1855, 3 Drew. 21; Cookes *v.* Cookes, 1863, 11 W. R. 871; O'Grady *v.* Corr, 1876, Ir. R. 10 Eq. 111; Alford *v.* Clay, 1875, Ir. R. 9 Eq. 215.

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§§ 711, 712. XXX. r. 7 now runs as follows: "On the hearing of the summons the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, *or by production of documents or entries in books, or by copies of documents or entries*, or otherwise as the court or judge may direct." The object of this rule is, "under the powers of the Act (*i.e.*, the Judicature Act) of 1894, to dispense to a certain limited extent with the technical rules of evidence."[1]

§ 712.[2] In the administration of Roman law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, was deemed presumptive evidence (semi-plena probatio)[3] of the justice of his claim; and in such cases, the suppletory oath of the party (juramentum suppletivum) was admitted to make up the plena probatio necessary to a decree in his favour.[4] Several modern systems of jurisprudence follow this

Lindley, L.J., in Baerlein *v.* The Chartered Mercantile Bank, [1895] 2 Ch. 488, in which case the result of this rule is much discussed, and also the result of r. 6 among the regulations passed "for the guidance of the practitioners in the Commercial Court" (Lindley, L.J.). It has been doubted whether this rule applies to the procedure to be observed on the hearing of the summons or at the trial. As, however, the particular fact as to which the ordinary rules of evidence are to be dispensed with is to be "specified in the order," it seems that the rule intends to give a master power to deal with the mode of giving evidence at the trial. Whether the Judicature Act of 1875 (§ 20) or the Judicature Act of 1894 (§ 3) gave power to make such a rule is open to grave question. See ante, § 393 A.

[2] Gr. Ev. § 119, verbatim.

[3] This degree of truth is thus defined by Mascardus:—"Non est ignorandum probationem semiplenam eam esse, per quam rei gestæ *fides aliqua* fit judici: non tamen tanta ut jure debeat in pronuncianda sententia eam sequi": 1 de Prob., Quæst. 11, n. 1, 4.

[4] "Juramentum (suppletivum) defertur ubicunque actor habet pro se—aliquas conjecturas, per quas judex inducatur ad suspicionem vel ad opinandum pro parte actoris": 3 Masc. de Prob., Concl. 230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of account, concur in opinion that they are entitled to consideration, at the discretion of the judge. They furnish at least the *conjectura* mentioned by Mascardus: and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, De Statutis. § 5, cap. 2, n. 9:—"An ut credatur libris rationem, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur? Respondeo, quamvis exemplo perniciosum esse videatur, quemque sibi privata testatione, sive adnotatione facere debitorem. Quia tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et causis, ex æquo et bono est judicandum. Insuper non admisso aliquo litium accelerandarum remedio, commerciorum ordo et usus evertitur. Neque enim omnes præsenti pecunia merces sibi comparant, neque cujusque rei venditioni testes adhiberi, qui pretia mercium noverint, aut expedit, aut congruum est. Non

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§§ 712, 713.

doctrine. Thus, by French law, the books of merchants and tradesmen, regularly kept, and written from day to day without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and, with his suppletory oath, are received as full proof to establish his demand.[1] The doctrine is also acted upon in Scotch law, by which the books of merchants and others, if kept with such a reasonable degree of regularity as to be satisfactory to the court, may be received in evidence, the party being allowed to give his own "oath in supplement" of such imperfect proof; though a course of dealing, or other "pregnant circumstances," must apparently be, in general, first shown by evidence aliundè, before the proof can be regarded as amounting to that degree of semi-plena probatio, which may be rendered complete by the oath of the party.[2]

§ 713. Reference to these laws is made here because it is conceived that the adoption of a somewhat similar practice in all the English and Irish courts of justice would prove highly beneficial, especially in cases where actions are brought or defended by the representatives of persons deceased.

iniquum videbitur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculis juventur." See, also, Hertius, de Coll. Leg. § 4, n. 68; 7 Stryk. de Sem. Prob., Disp. 1, cap. 4, § 5; Menoch. de Præs., lib. 2, Præs. 57, n. 20, and lib. 3, Præs. 63, n. 12.

[1] Poth. Obl., Part iv. ch. 1, art. 2, § 4. By the Code Napoleon, merchants' books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence: Code de Commerce, Liv. 1, tit. 2, art. 8—12.

[2] Tait, Ev. (Sc.) 273—277. This degree of proof is there defined as "not merely a suspicion,—but such evidence as produces a reasonable belief, though not complete evidence." See, also, 2 Dickson, Ev. (Sc.), §§ 1179 et seq.; Glassf. Ev. (Sc.) 550; Bell, Dig. (Sc.) 378, 898.

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CHAPTER VIII.

DYING DECLARATIONS.

§ 714. § 714.[1] The last of the six exceptions, which it has been pointed out[2] that there are to the general rule that hearsay evidence must be rejected, arises in the case of *dying declarations*. The principle on which evidence of this description is admitted is "that such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice."[3] At one time an opinion prevailed that this general principle warranted the admission of dying declarations in all cases, civil and criminal.[4] A contrary

[1] Gr. Ev. § 156, in part.

[2] Supra, § 607.

[3] R. *v.* Woodcock, 1789, 1 Leach, 504 (Eyre, C.B.); R. *v.* Drummond, 1784, 1 Leach, C. C. 338. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis, exclaim:—

"Have I not hideous death within my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me *now* deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here, and live hence by truth?"—

King John, Act 5, sc. 4.

[4] Thus, the dying declarations of a subscribing witness to a forged instrument could be given in evidence to impeach it: Wright *v.* Littler, 1761, 1 W. Bl. 349; which, however, as reported in Blackstone, stated that no general rule could be drawn from the admission of the evidence in that particular case: Anon. (undated. Heath, J.), cited by Ld. Ellenborough (who apparently approved of it) in Aveson *v.* Ld. Kinnaird, 1805, 6 East, 188, and in Bp. of Durham *v.* Beaumont, 1808, 1 Camp. 207; explained by Bayley, J., in Doe *v.* Ridgway, 1820, 4 B. & Ald. 53. Moreover, the dying declarations of a pauper respecting his settlement were once admissible: R. *v.* Bury St. Edmunds, 1784, Cald. 486; Appotens

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§§ 714, 715.

doctrine, however, now prevails,[1] both in England and America, and evidence of this description is not admissible in any civil case. In criminal cases it is so only in the one case of *homicide*,[2] "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration,"[3] and where it is offered in the very words of the deceased, both questions and answers being given where questions have been put.[4]

§ 715. A strong instance of the admissibility of dying declarations as evidence in charges of homicide[2] is, that where a prisoner who was charged with the murder of A. had, in poisoning A., inadvertently also poisoned B. (which was in law a murder of B.), the dying depositions of B. were admitted as evidence for the prosecution on prisoner's trial for the murder of A.,—for the act which caused the death of A. also caused that of B., and it was all one transaction.[5] On the other hand, the principle that dying declarations are only admissible as evidence on charges of homicide[2] is shown by dying declarations of the party robbed having been rejected on a trial for robbery;[6] and by her statements in extremis being held inadmissible on an indictment for administering drugs to a woman, with intent to procure abortion;[7] while in Ireland, even on a trial for murder, the statement of *a third person*, who has on his deathbed confessed that he committed the offence, has been rejected.[8] Where, too, a party, convicted of perjury, after obtaining a rule nisi for a new trial, shot the prosecutor, the court rejected an affidavit of the dying declarations of the latter, as to the transaction out of which the prosecution

v. Dunswell, 1699, 2 Bott. 80. But this doctrine has long been exploded. See R. *v.* Abergwilly, 1801, 2 East, 63; Stobart *v.* Dryden, 1836, 5 L. J. Ex. 218.

[1] See Stobart *v.* Dryden, 1836, 5 L. J. Ex. 218, where the cases cited in the preceding note were virtually overruled, and also cases cited in note [4], infra. See, too, ante, § 568.

[2] *I.e.*, murder or manslaughter.

[3] R. *v.* Mead, 1824, 2 B. & C. 608; R. *v.* Hind, 1860, 29 L. J. M. C. 147; Wilson *v.* Boerem, 1818, 15 Johns. 286 (Am.).

[4] R. *v.* Mitchell, [1892, 17 Cox, C. C. 503; R. *v.* Smith, 1901, 65 J. P. 426, but see R. *v.* Whitmarsh, 1898, 62 J. P. 680, 711, post, § 720.

[5] R. *v.* Baker, 1837, 2 M. & Rob. 53 (Coltman, J., after consulting Parke, B.). The point could not be reserved, as prisoner was acquitted.

[6] R. *v.* Lloyd, 1830, 4 C. & P. 233.

[7] R. *v.* Hutchinson, 1822, 2 B. & C. 608, n.; R. *v.* Hind, 1860, 29 L. J. M. C. 147. In 1 Ph. Ev. 282, a statement that these declarations were held admissible is a mistake, corrected in later editions.

[8] R. *v.* Gray, 1841, Ir. Cir. R. 73; but cp. R. *v.* Baker, note [5].

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§§ 715, 716.

for perjury arose.[1] As to civil cases, the dying declarations of a servant of the party last seised, as to the relationship of such party with the lessor of the plaintiff, have been rejected in an action of ejectment.[2]

§ 716.[3] The reasons for thus restricting the admission of this species of evidence may be,—first, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,—secondly, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute "the *whole* truth,"—and thirdly, the experienced fact, that implicit reliance cannot in all cases be placed on the declarations of a dying person; for his body may have survived the powers of his mind;[4] or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say, or seem to say, whatever they choose to suggest.[5] As these, or the like considerations, are thought in ordinary cases to counterbalance the force of the general principle above stated, the exception to the general rule against admitting hearsay evidence, which is now under review, is restricted to cases of homicide, and is there recognised on the sole ground of public *necessity*. For as in such cases it often happens that no third person was present as an eye-witness to a murder, and as the party injured, who is the usual witness in other cases of felony, cannot himself be called, it follows that if his dying declarations could not be received, the murderer might often escape justice.[6] It will be remembered, moreover, that the restriction of their admissibility to cases of homicide applies only to such declarations as are tendered merely because they were made in extremis. Declarations (whether made by a dying person or not) which constitute part of the res

[1] R. *v.* Mead, 1824, 2 B. & C. 608. Ald. 53.

[2] Doe *v.* Ridgway, 1820, 4 B. &

[3] Gr. Ev. § 156, in part.

[4] Thus, in *King John*, Prince Henry is made to say:—

> "Death's siege is now
> Against the mind, the which he pricks and wounds
> With many legions of strange fantasies;
> Which, in their throng and press to that last hold,
> Confound themselves."—Act 5, sc. 7.

[5] Jackson *v.* Kniffen, 1806, 2 Johns. 31 (Am.).

[6] 1 East, P. C. 353; 2 Johns. 35 (Am.).

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gestæ, or come within the exception of declarations against interest, or the like, are admissible as in other cases.

§ 717.[1] Persons making dying declarations are considered as in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath. Therefore, when the declarant, if living, would have been legally incompetent to testify (by reason of imbecility or tender age, &c.), his dying declarations are inadmissible.[2] On the other hand, as the testimony of an accomplice is admissible against his fellows, the dying declarations of an accomplice are admissible against one indicted for causing the death of such accomplice by an illegal operation.[3] And when a husband is charged with the murder of his wife, or a wife with the murder of her husband, the dying declaration of the deceased will be received.[4]

§ 718. It is essential to the admissibility of dying declarations, first, that the declarant should have been in *actual danger of death* at the time when they were made; secondly, that he should then have had a *full apprehension of his danger*;[5] and lastly, that *death should have ensued*.[6] These three things must be proved to the satisfaction of the judge before a "dying declaration" can be received.[7] It[8] is not, however, necessary that the declarant should have expressly said, in so many words, that he was speaking *under a sense of impending death*. It will be enough if it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as, for instance, if that fact can be reasonably inferred from the evident danger of the declarant,[9] or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his

[1] Gr. Ev. § 157, in part.

[2] R. *v.* Pike, 1829, 3 C. & P. 598; R. *v.* Drummond, 1784, 1 Leach, C. C. 338.

[3] R. *v.* Tinckler, 1781, 1 East, P. C. 354.

[4] R. *v.* Woodcock, 1789, 1 Leach, C. C. 504; Stoop's case, 1799, Addis. 381.

[5] R. *v.* Cleary, 1862, 2 F. & F. 850.

[6] In Sussex Peer., 1844, 11 Cl. & Fin. 108, 112 (H. L.), Ld. Denman thus laid down the law:—"With regard to declarations made by persons in extremis, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger, and of death, such declarations can be received in evidence; but *all these things must concur* to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination."

[7] Ante, § 23.

[8] Gr. Ev. § 158, in part.

[9] See R. *v.* Morgan, 1875, 14 Cox, C. C. 337. In R. *v.* Bedingfield, 1879, 14 Cox, C. C. 341, Cockburn, C.J., declined to rely on such evidence. Sed qu.?

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§ 718. affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant's mind.[1] The length of time which elapsed between the declaration and the death of the declarant, furnishes no rule for the admission or rejection of the testimony; though, in the absence of better evidence, it may serve as one of the exponents of the deceased's belief, that his recovery was or was not impossible. There is no case in which the consciousness of the deceased that he was in a dying state at the time he made the declaration has been presumed from the effect exercised by the nature of the wound itself on his state of mind. Where a man has been shot through the body the court will not, in the absence of other evidence, presume that he must necessarily feel certain of death.[2] In the same way the statement of a woman made after her throat had been badly cut, and a few minutes before her death, will not be admissible in the absence of anything else to show she was under the sense of impending death.[3] It is the *impression* of *impending* death,[4] and not the circumstance that death in point of fact followed very soon after the declaration was made, which renders the testimony admissible. If, therefore, it appear that the deceased, at the time of the declaration, had no expectation or hope of recovery although subsequently he may express such a hope [5] or linger for some time, the declaration will be admissible.[6]

[1] R. *v.* Woodcock, 1789, 1 Leach, C. C. 504; R. *v.* John, 1790, 1 East, P. C. 357; R. *v.* Bonner, 1834, 6 C. & P. 386; R. *v.* Van Butchell, 1829, 3 C. & P. 631; R. *v.* Mosley, 1825, 1 Moo. C. C. 97; R. *v.* Spilsbury, 1835, 7 C. & P. 187; R. *v.* Minton, 1800, M'Nally, Ev. 386; R. *v.* Scallan, 1838, Craw. & D. Abr. Cas. 340 (Ir.). See R. *v.* Nicolas, 1852, 6 Cox, C. C. 121; R. *v.* Qualter, 1854, 6 Cox, C. C. 357; R. *v.* Perkins, 1840, 9 C. & P. 395.

[2] R. *v.* Cleary, 1862, 2 F. & F. 850; R. *v.* Morgan, 1875, 14 Cox, C. C. 337.

[3] R. *v.* Bedingfield, 1879, 14 Cox, 341.

[4] R. *v.* Forester, 1866, 4 F. & F. 857, where the law seems to have been laid down somewhat too strictly.

[5] R. *v.* Hubbard, 1881, 14 Cox, C. C. 565.

[6] In R. *v.* Woodcock, 1789, 1 Leach, 504, the declarations were made two days before death; in R. *v.* Bonner, 1834, 6 C. & P. 386, three days; in R. *v.* Whitworth, 1858, 1 F. & F. 382, six days; in R. *v.* Tinckler, 1781, 1 East, P. C. 354, ten days; in R. *v.* Reaney, 1857, 26 L. J. M. C. 43; in R. *v.* Mosley, 1825, 1 Moo. C. C. 97, eleven days; and in R. *v.* Bernadotti, 1869, 11 Cox, C. C. 316, nearly three weeks; yet they were all received. In R. *v.* Mosley, 1825, 1 Moo. C. C. 97, and in R. *v.* Whitworth, 1858, 1 F. & F. 382.

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§§ 718, 719.

Any expectation or hope of recovery, however slight, will exclude the declaration.[1] What is meant by the word impending is doubtful upon the cases. It has been held by the Court of Crown Cases Reserved that it means an expectation that death will soon follow from the injuries then suffered from. An expectation of death at some future time, however settled, is not sufficient.[2] In a later case before the same court it was held that in order to make a dying declaration admissible there must be an expectation of impending and almost immediate death from a cause then operating, and it was pointed out that dying declarations should be admitted with scrupulous care.[3] This would seem to limit the meaning of impending. It has since been held that the expectation must be of immediate death: "If he thinks he will die to-morrow, that will not do"[4]; and this principle was adopted in a subsequent decision.[5] But both these cases were decisions of single judges. The true principle would seem to be that the judge must be satisfied that the expectation of death is so immediate as to give to the declaration a solemnity sufficient to dispense with those sanctions necessary to ensure the purity of evidence in other cases.

§ 719. In Scotland it is immaterial, except as regards the *weight* of the evidence, whether or not the declaration be made under the impression of impending death; but where a party has received a mortal wound, an account of the matter given by him at any time subsequent to the injury will be admissible in the event of his death, provided it were made seriously and

it appeared that the surgeon did not think the case hopeless, and told the patient so: but the patient thought otherwise. See, also, R. *v.* Peel, 1860, 2 F. & F. 21; R. *v.* Howell, 1845, 1 C. & K. 689.

[1] R. *v.* Welborn, 1792, 1 East. P. C. 358; R. *v.* Christie, 1821, 3 Russ. C. & M. 355; R. *v.* Jenkins, 1869, L. R. 1 C. C. R. 187; R. *v.* Mackay, 1868, 11 Cox, C. C. 148; R. *v.* Hayward, 1833, 6 C. & P. 157; R. *v.* Crockett, 1831, 4 C. & P. 544; R. *v.* Fagent, 1835, 7 C. & P. 238; R. *v.* Megson, 1840, 9 C. & P. 420. Dying declarations by persons who said, "I have no hope of recovering, unless it be the will of God" (R. *v.* Murphy, 1841, 1 Arm. M. & O. 206 (Richards, B.) (Ir.)); "I think myself in great danger" (R. *v.* Errington, 1838, 2 Lewin, C. C. 142); "I am aware that I am seriously ill" (R. *v.* Smith, 1901, 65 J. P. 426); or by a person previously told by a doctor that there was "*little or no* hope of recovery" (R. *v.* Mitchell, 1892, 17 Cox, C. C. 503), have been respectively rejected. See R. *v.* Howell, 1845, 1 C. & K. 689.

R. *v.* Reaney, 1857, 7 Cox, 209.

[2] R. *v.* Jenkins, 1869, L. R. 1 C. C. R. 187.

[3] R. *v.* Osman, 1881, 15 Cox, 1.

[4] R. *v.* Gloster, 1888, 16 Cox, 471.

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§§ 719, 720. deliberately, and whilst the deceased appeared to be aware of what he was doing, and in the possession of his faculties.[1]

§ 720. The dying declarations of a deceased are admissible *only as to matters to which he would have been competent to testify*, if sworn in the cause. Therefore they must in general narrate facts only, and not mere opinions;[3] and they must be confined to what is relevant to the issue. But it is not necessary that the examination of the deceased should have been conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the credibility of the declarations. Therefore, in general, it is no objection to their *admissibility*, that they were made in answer to leading questions,[4] or obtained by earnest solicitation.[5] But where a statement, ready written, was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was, in Ireland, rejected, the judge observing that, "in the state of languor in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true;" and adding, "the magistrate should not have trusted to the relation of a third person, but should have taken down the deceased's declaration from her own lips, or at least have had it taken down in his presence."[6] In a case, however,[7] which was twice tried before different judges, it appeared that a woman, when not in expectation of death, was seen by a police-inspector, who asked her questions, and from the answers she gave wrote out a statement which she signed. Subsequently, when the woman was in hopeless expectation of death, she was seen by a police

[1] Alison, Prac. Cr. L. (Sc.) 510—512, 604—607; 2 Hume, Com. 391—393; 1 Dickson, Ev. 66, 67. The same law seems to have prevailed in England a century ago. See R. *v.* Blandy, 1752, 18 How. St. Tr. 1187.

[2] Gr. Ev. § 159, in part.

[3] R. *v.* Sellers, 1796, Carr. Cr. L. 233.

[4] R. *v.* Smith, 1865, 34 L. J. M. C. 153.

[5] R. *v.* Fagent, 1835, 7 C. & P. 238; R. *v.* Reason, 1722, 1 Str. 499; Com. *v.* Vass, 1831, 3 Leigh, R. 786 (Am.); R. *v.* Whitworth, 1858, 1 F. & F. 382.

[6] R. *v.* Fitzgerald, 1841, Ir. Cir. R. 168 (Crampton, J.).

[7] R. *v.* Whitmarsh, 1898, 62 J. P. 680 (Darling, J.); 62 J. P. 711 (Bigham, J.)

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§§ 720, 721.

magistrate, who commenced to take her statement, but finding her too exhausted to proceed, he took the statement previously written out by the police-inspector, and repeated portions of it to her in his own words, wrote down such portions, and asked her if it was correct; he then read the whole statement to her, and she signed it. This statement was admitted at both the trials as a valid dying declaration. This case appears to go beyond previous decisions, and to be in conflict with the cases deciding that the declaration must be in the words of the deceased, both questions and answers being given when questions have been put;[1] and it seems doubtful whether it is not too great an extension of the law, for it will be noticed that not only was the declaration not in the words of the woman but in those of the police magistrate, but that even his words were based upon a statement, itself in the words of a police-inspector, and not of the deceased woman. And in a more recent case[2] the principle that the statement must be in the actual words of the deceased, and the questions and answers both given, if the statement be in answer to questions, was reaffirmed. Dying declarations by the victim of a homicide are, if properly made, equally admissible in favour of an accused as well as of the prosecutor.[3]

§ 721.[4] Whatever the declaration may be, it must be *complete* in itself; for, if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, it will not be received.[5] Again, if the statement were *committed to writing* at the time it was made, this writing must be produced, or its non-production accounted for; and neither a copy, nor parol evidence of the declaration, can be admitted in the first instance to supply the omission.[6] But where three declarations had been made at different times on the same day, one of which was made under oath to a magistrate, and reduced to writing, but the other two were not, it was

Ante, § 714.

R. *v.* Smith, [1901], 17 T. L. R. p. 552. In this case, R. *v.* Mitchell, 1892, 17 Cox, C. C. 503, was considered and acted upon.

R. *v.* Scaife, 1836. The same law prevails in Scotland, 2 Hume, Com. (Sc.) 393; cp. R. *v.* Gray, ante, § 715.

[4] Gr. Ev. §§ 159 and 161, in part. 3 Leigh. R. 797.

R. *v.* Gay, 1835, 7 C. & P. 230; R. *v.* Reason, 1734, 1 Str. 499. But see ante, § 415.

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§§ 721, 722.

held that these last two might be proved by parol, though the written statement was not produced.[1] If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible as such, for want of compliance with some of the legal formalities, it seems that it may still be treated as a dying declaration, if made by a declarant who was in extremis.[2]

§ 722.[3] Though declarations, deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has not the *power of cross-examination*,—a power often as effectual in eliciting the truth as is the obligation of an oath;—and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[4]

[1] R. *v.* Reason, 1734, 1 Str. 499 (Platt, C.J., dubit). See R. *v.* Scallan, 1838, Craw & D. Abr. Cas. 340 (Ir.).

[2] R. *v.* Woodcock, 1789, 1 Leach, 504; R. *v.* Callaghan, 1793, McNally, Evid. 385.

[3] Gr. Ev. § 162, in great part.

[4] Jackson *v.* Kniffen, 1806, 2 Johns. 31 (Am.); R. *v.* Ashton, 1837, 2 Lewin C. C. 147. See, also, Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 St. Ev. 367; and 1 Ph. Ev. 292.

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CHAPTER IX.

ADMISSIONS.

§ 723. § 723.[1] *Admissions and confessions* are often considered as declarations against interest, and, therefore, probably true. With regard, however, to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof;[2] either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.[3] Many admissions, however, being made by third persons, are receivable on mixed grounds; partly,

[1] Largely Gr. Ev. § 169.

[2] As to when the admissions of a party with respect to written instruments may be substituted for the ordinary proof of such instruments by their production, see ante, §§ 410—414.

[3] According to Mascardus, this is the light in which confessions and admissions are regarded by the Roman law. *Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem, quam proprie probationem:* 1 Masc. de Prob. quæst. 7, n. 1, 10, 11; Menoch. de Præs. lib. 1, quæst. 61, n. 6; Alciat. de Præs. par. 2, n. 4. We further find that Roman law distinguishes, with great clearness and precision, between confessions extra judicium, and confessions in judicio; treating the former as of very little and often of no weight, unless corroborated, and the latter as generally, if not always, conclusive, even to the overthrow of the presumptio juris et de jure; thus constituting an exception to the conclusiveness of this class of presumptions. But to give a confession this effect, certain things are essential, which Mascardus cites out of Tancred:—

> "Major, spontè, sciens, contra se, ubi jus fit;
> Nec natura, favor, lis, jusve repugnet, et hostis."

Masc. ub. sup. n. 15: Vid. Dig. lib. 42, tit. 2, de confessis; Cod. lib. 7, tit. 59; Van. Leeuw. Comm. book v. ch. 21.

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§§ 723—724a. as belonging to the res gestæ, partly, as made against the interest of the person making them, and partly, because of some privity with him against whom they are offered in evidence.

§ 724.[1] In our law, the term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent;[2] while the term *confession* is generally used in *criminal* law, and as denoting an *acknowledgment of guilt*. This distinction will be better understood by an example. On the trial of Lord Melville, who was charged (amongst other things) with *criminal* misapplication of moneys received from the Exchequer, the admission of his agent and authorised receiver was held sufficient proof of the fact of such agent having received the public money. But had such admission been tendered in evidence to establish the *criminal* charge of misapplication of money it would have been rejected.[3]

§ 724A. As the rules of evidence, respectively applicable to admissions and confessions, differ in some respects, the two subjects will be discussed in separate chapters.

§ 724A (i). With regard to all ADMISSIONS in proceedings in the Supreme Court, the law, after several changes,[4] is now embodied in the R. S. C., 1883, Order XXXII., which, however, does not apply to criminal or divorce and matrimonial proceedings or to proceedings on the Crown or Revenue sides of the King's Bench Division.[5]

[1] Gr. Ev. § 170, almost verbatim.

[2] Ld. Melville's trial, 1806, 29 How. St. Tr. 707.

[3] Lord Chancellor Erskine said:—"This first step in the proof" (namely, the receipt of the money by the agent), "must advance by evidence applicable alike to civil, as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime": 29 How. St. Tr. 764.

[4] See R.-Gen., 2 W. 4, 1832, reported in 3 B. & Ad. 392, 393; Reg.-Gen., H. T., 4 W. 4, r. 20, 1832, reported in 4 B. & Ad. pp. 2—8; Reg.-Gen., H. T., 1853; 15 & 16 V. c. 76, §§ 117, 118; R. S. C. 1875, Ord. XXXII., rr. 1—4. For the practice on the Revenue side of the Queen's Bench Division, see Reg.-Gen., 24 V. r. 17; 6 H. & N. xiii.; for that in proceedings under the Public Worship Regulation Act, 1874, 37 & 38 V. c. 85, see Reg.-Gen., 22 Feb. 1879, r. 46, and Form 39, cited 4 P. D. 261, 284; for that to be used in the Court of Probate, see Rules of 1862, for Ct. of Prob. in contentious business, r. 72, and Form No. 20. The Rules of 1865, 1869, 1875, 1877, and 1880, for the Ct. of Div. and Mat. Causes, are, for some unaccountable reason, silent on this subject.

[5] Ord. LXVIII. r. 1.

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§ 724A (ii). By Rule 1 of the Order just mentioned, "Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."[1]

§ 724A (iii). Admissions,[2] properly so called, are properly the subject of a treatise upon Practice, and Practice is not the subject of this work. Therefore the matter of admissions will be only here dealt with in a cursory way, and with a view to those points which are most likely to arise in actual practice at Nisi Prius. For further information the reader is referred to one of the well-known works upon Practice.

§ 724A (iv). Subject to these general reservations, it may be noted that admissions are principally of two kinds, viz., (a.) Admissions of *documents*; and (b.) Admissions of *facts*.

§ 724A (v). As to admissions of *documents* in the High Court, Rule 2 of R. S. C., Order XXXII., provides that "Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense."[3]

§ 724B. The rule governing notices to admit documents, which has been set out in the preceding paragraph,[4] does not specify any exact time at which such notice must be given. But such a notice must be given a reasonable time before trial. Where, however, it was given on a plaintiff's behalf to the defendant's

[1] If a party admits all the facts pleaded against him, the other side cannot call evidence. See The Hardwick, 1883, L. R. 9 P. D. 32 (Sir James Hannen); Urquhart *v.* Butterfield, 1888, 37 Ch. D. 357 (C. A.).

[2] Admissions between co-defendants under this rule, to which the plaintiff is not a party, are not included in an order against him or in his favour for general costs of the action. See Dodds *v.* Freke, 1884, 25 Ch. D. 617. As to the practice generally, see Order XXXII. in the Annual Practice.

[3] By Rule 3 of Order XXXII., a Form of "Notice to admit Documents" is furnished, which is Form No. 11 in Appendix B.

[4] Viz., Order XXXII. r. 2.

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§§ 724b, 724c. agent in town only four days before the commission day at Newcastle, who two days afterwards refused to admit the documents without objecting to the sufficiency of the notice, or requiring further time,—the plaintiff was, however, held entitled to the costs of proof.[1] If an admission be made "with a saving of all just exceptions," it so far recognises the general character and accuracy of the documents, that no objection can subsequently be taken to the *authenticity* of any part of them,[2] or to their reception in evidence on the ground of any interlineation, however material, appearing upon them.[3] Unless this were so, great inconveniences would follow; for as one main object of inducing a party to admit under notice, is to dispense with the necessity of formal proof of the instrument, it would obviously open a door to fraud, if the party admitting were at liberty afterwards to object to an interlineation, which the attesting witness might alone be enabled to explain.[4] Accordingly, where a party admitted a deed as "the counterpart of a lease," an objection at the trial, that it was in fact a lease, and as such inadmissible for want of a sufficient stamp,[5] was overruled;[6] and a party who admitted an instrument, specified in the notice as bearing date the 10th August, was not allowed to call on his opponent for an explanation, though on the production of the instrument it was evident that the date "August" had been written on an erasure.[7]

§ 724c. A variance, too, in the description of the document, if not of a nature to mislead, will not release the admitting party from his obligation. For instance, an admission will not be vitiated because the date of a promissory note, otherwise correctly described in the notice to admit, is misstated.[8] A party will not, however, be entitled to the costs of proving any document specified in the notice, unless the witness called to establish this proof has, at least in his examination in chief, been questioned to no other

[1] Tinn *v.* Billingsley, 1835, 2 C. M. & R. 253.
[2] Hawk *v.* Freund, 1858, 1 F. & F. 294.
[3] Freeman *v.* Steggall, 1849, 19 L. J. Q. B. 18.
[4] Id. 203 (Coleridge, J.).
[5] See *now* 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 14.
[6] Doe *v.* Smith, 1838, 8 A. & E. 255.
[7] Poole *v.* Palmer, 1842, Car. & M. 69.
[8] Field *v.* Hemming, 1836, 7 C. & P. 619; Bittleston *v.* Cooper, 1845, 14 M. & W. 399.

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fact.[1] And, when a notice to admit documents is given, all that can fairly be asked is, that the handwriting or due execution of the papers specified should be admitted; so that where a party includes in his notice *a demand to admit the authority* by which the documents had been written, and, on the other side refusing generally to make the admission as prayed, proves the documents at the trial, he is not entitled to recover from his opponent the costs of such proof.[2]

§ 724D. It is not necessary to show that the admitting party has actually examined the documents mentioned in the notice, if he has had an opportunity of doing so;[3] and it seems to be unnecessary to identify the document produced at the trial with the one inspected, provided that it corresponds with the description contained in the notice.[4] On two occasions, however, the necessity for such evidence has been urged[5] (if not acknowledged by the court); and it will generally be prudent to be prepared with such proof, or, at least, to have the documents that are to be produced signed or marked by the party making the admission.

§ 724D (i). Though a notice to admit do not contain any saving of all just exceptions, the party admitting may still rely on any valid objection to the admissibility of a document specified in it. Therefore, where a plaintiff admitted that a paper was a copy of a letter from himself to a defendant, who had suffered judgment by default, this was held not to entitle the other defendant to put in the copy, without first accounting for the non-production of the original, or tracing it to the plaintiff's possession, and proving the notice to produce.[6]

§ 724E. Rule 2 of Order XXXII. extends, moreover, to every document which a party purposes to adduce in evidence, whether or not it be in his custody or control,[7] and whether or not it be

[1] Stracey *v.* Blake, 1835, 7 C. & P. 404.

[2] Oxford, Worc., & Wolverh. Ry. Co. *v.* Scudamore, 1857, 1 H. & N. 666.

[3] Doe *v.* Smith, 1838, 8 A. & E. 255 (Patteson and Coleridge, JJ.).

[4] Id., Coleridge, J., who observed, that "to require such evidence would be multiplying proofs, so as to defeat the rule of court."

[5] Clay *v.* Thackrah, 1839, 9 C. & P. 53; Doe d. Tindal *v.* Roe, 1836, 5 Dowl. 420.

[6] Sharpe *v.* Lamb, 1840, 11 A. & E. 805. See Goldie *v.* Shuttleworth, 1807, 1 Camp. 70; Rochfort *v.* Sedley, 1861, 12 Ir. C. L. R. App. IV.

[7] Rutter *v.* Chapman, 1841, 11 L. J. Ex. 178.

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§§ 724e, 724f. put in issue by the pleadings.[1] Neither will the case be varied though the opposite party may have already, irrespective of the notice, refused in positive terms to make any admission on the subject.[2] A party may even, as it would seem, be served with notice to admit a foreign judgment, or other documents in a foreign court, provided that his opponent will give him time to inspect them abroad, and pay his expenses incurred in so doing.[3] Still, the rules do not apply where ancient records of a public nature require, not proof, but translation and explanation, or where affidavits which have been filed must be produced by an officer; and, consequently, a party is entitled to the costs, either of a witness called to explain and translate the records, or of the officer who produced the affidavits, even where the other side were not previously called upon to admit these documents.[4]

§ 724F. In consenting to admit for the purposes of a trial, care must be taken lest, by the words used in the notice to admit, the party admitting should be entrapped into making a larger admission than he intended. Where[5] the holder of a bill of exchange sued the acceptor, and the defendant's solicitor had written a letter admitting "that the acceptance to the bill on which the action is brought is in the defendant's handwriting," it was held that, though a plea denying the acceptance had been subsequently pleaded, the admission contained in the letter established a prima facie case on behalf of the plaintiff without the production of the bill itself. Again, in an action[6] against three persons on a bill of exchange alleged to have been accepted by them under the style of "The Newbridge Coal Company," an admission under a notice to admit, which stated the bill to have been "accepted by Bishop *for the defendants* as the Newbridge Coal Company," was held to be not only an admission of the actual signature of Bishop, but to preclude the defendants from denying that he had authority to bind them by his acceptance. This last decision is certainly

[1] Spencer *v.* Barough, 1842, 11 L. J. Ex. 378.
[2] Id.
[3] Smith *v.* Bird, 1835, 3 Dowl. 641.
[4] Bastard *v.* Smith, 1829, 10 A. & E. 213.
[5] Chaplin *v.* Levy, 1854, 23 L. J. Ex. 117.
[6] Wilkes *v.* Hopkins, 1845, 14 L. J. C. P. 225. See, also, Hunt *v.* Wise, 1859, 1 F. & F. 445.

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one strictissimi juris; and probably it would not be upheld at the present day.[1]

§ 724G. In the County Courts, the rule which governs notices to admit documents is as follows:—Where a party desires to give in evidence any document, he may, not less than *five* clear days before the trial, give notice[2] to any other party in the action or matter who is competent to make admissions, requiring him to *inspect and admit* such document; and if such other party does not within *three* days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever may be the result, unless the court otherwise orders; and no costs of proving any document shall be allowed unless such notice shall be given, except in cases where, in the opinion of the judge at the trial, or of the registrar on taxation, the omission to give such notice has been a saving of expense.[3]

§ 724H. Coming now to the subject of notices to admit *facts* in the High Court, Rule 4 of R. S. C., Order XXXII., provides:—"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any *specific fact or facts* mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also, that the court or a judge

[1] See Pilgrim *v.* Dorchester Ry. Co., 1835, 18 L. J. C. P. 330.

[2] C. C. R., 1903, Form 111. This is the same as Form 11 in Appendix B. to R. S. C., referred to ante, p. 517.

[3] C. C. R., 1903, Ord. XVIII. r. 6.

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§§ 724h, 724i.

may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."[1]

Rule 6 provides, that "any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just."

Rule 7 provides, with respect to the mode of proof, that "an affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required;" and by virtue of Rule 9, the costs occasioned by any notice to admit unnecessary documents, "shall be borne by the party giving such notice."

§ 724i. In the County Court, notices to admit *facts* and admissions thereof, are governed by the following Rules of County Courts, Order IX.:—

(8.) "Any party may by notice in writing, according to the form in the Appendix,[2] at any time not later than six clear days before the return day, call on any other party to admit,[3] for the purposes of the action, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same by the delivery of a written admission of the fact or facts as aforesaid, not less than three clear days before the return day, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the action, matter, or issue may be, unless at the trial the court certifies that the refusal to admit was reasonable, or unless the court at any time otherwise orders. Provided that any admission made in pursuance of such notice shall be deemed

[1] Rule 5 provides, that "A notice to admit facts shall be in the Form No. 12, in Appendix B., and admissions of facts shall be in the Form No. 13 in Appendix B., with such variations as circumstances may require."

[2] Appendix to C. C. Rules, Form 113, corresponding to Form No. 12 in Appendix B. to R. S. C.

[3] Id., Form 114, corresponding to Form No. 13 in Appendix B. to R. S. C.

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to be made only for the purposes of the particular action, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving notice: provided also, that the court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."[1]

(9.) "An affidavit of the solicitor or his clerk of the due signature of any admissions made in pursuance of this order, shall be sufficient evidence of such admissions, if evidence thereof be required."[2]

§ 725. It will now be convenient to discuss the general law of admissions, apart from any mere rules of Practice. Here the *first important rule* to be borne in mind is, that *the whole statement containing the admission must be taken together*; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained.[3] But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him.[4]

§ 726. Simple as this rule appears, its practical application is not without difficulty. It will therefore be convenient briefly to refer to a few of the leading decisions on it. First, such rule *applies equally both to written and to verbal admissions*. Consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his

[1] This rule corresponds to R. S. C., Ord. XXXII. r. 4, supra, p. 521.

[2] Corresponding to R. S. C., Ord. XXXII. r. 7, supra, p. 522.

[3] Thomson *v.* Austen, 1823, 2 Dowl. & Ry. 361; Fletcher *v.* Froggatt, 1827, 2 C. & P. 569 (id.); Cobbett *v.* Grey, 1849, 19 L. J. Ex. 137.

[4] Bermon *v.* Woodbridge, 1781, 2 Doug. 788; Smith *v.* Blandy, 1825, Ry. & M. 259; Cray *v.* Halls, 1825, cited Ry. & M. 259 (Abbott, C.J.). See, also, Whitwell *v.* Wyer, 1814, 11 Mass. 6 (Am.); Garey *v.* Nicolson, 1840, 24 Wend. 350 (Am.); Kelsey *v.* Bush, 1842, 2 Hill, S. Car. R. 440 (Am.).

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§§ 726, 727. demand, it will be equally admissible in evidence of the defendant's set-off;[1] though the plaintiff will generally be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side.[2] Where, however, to an action on an attorney's bill of costs, the defendant pleaded a set-off, and put in an account furnished to him by the plaintiff, in which the plaintiff credited himself for the amount of his bill, and debited himself for the amount of goods sold, it was held that the defendant could not exclude from the consideration of the jury so much of such account as related to the bill of costs, on the ground that no signed bill had been delivered; since the non-delivery of a signed bill does not bar the debt, but merely, if insisted on, prevents its recovery by action.[3]

§ 727. When the admission is contained in an affidavit, written examination,[4] signed pleading,[5] answer,[6] plea[7] in Chancery, or other document complete in itself, delivered under the old system of pleading and practice, the whole document is required to be read, though the jury are not bound to give equal credit to every part of it, and they frequently lent an academic faith to such portions as make in favour of the declarant.[8] So stringent is this rule, that where, in consequence of technical objections which had been taken to the first answer to a bill in Chancery, a second answer had been sent in, defendant was allowed to insist upon having such second answer also read, in order to explain what he had sworn in his first answer.[9] Moreover, a party, against whom an answer in Chancery is produced, may have the

[1] Randle *v.* Blackburn, 1813, 5 Taunt. 245.

[2] Rose *v.* Savory, 1835, 4 L. J. C. P. 275. See Moorhouse *v.* Newton, 1849, 3 De G. & Sm. 307.

[3] Harrison *v.* Turner, 1847, 16 L. J. Q. B. 295.

[4] In Prince *v.* Samo, 1838, 7 L. J. Q. B. 123, Coleridge, J., asked whether the question had ever been decided as to depositions? Counsel replied that no express decision had been found.

[5] Marianski *v.* Cairns, 1851-2, 1 Macq. 212. In the Supreme Court the rule respecting the signing of pleadings is R. S. C. 1883, Ord. XIX. r. 4.

[6] See Cons. Ord. Ch. Ord. XV. rr. 5, 6.

[7] Pleas in Chancery, where the matter of the plea did not appear upon record, must have been upon oath, and be signed by the parties pleading: Cons. Ord. Ch. 1860, Ord. XIV. rr. 2, 3.

[8] Bernon *v.* Woodbridge, 1781, 2 Doug. 788; Blount *v.* Burrow, 1792, 5 Brown, C. C. 75; Baildon *v.* Walton, 1847, 17 L. J. Ex. 357; Percival *v.* Caney, 1851, 4 De G. & Sm. 623.

[9] R. *v.* Carr, 1669, 1 Sid. 418; Ld. Bath *v.* Bathersea, 1695, 5 Mod. 10; Lynch *v.* Clerke, 1696, 3 Salk. 154.

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whole bill read as part of his adversary's case, on the ground that, like the ordinary case of a conversation, the answers of a party cannot be given in evidence against him without also proving the questions which drew forth the answers.[1] The jury, however, might in such case be warned, that the statements in the bill were not admissions of the facts contained therein; it being notorious that allegations, not consistent with fact, were frequently introduced into a bill, for the sole purpose of eliciting the truth from the opposite party.[2]

§ 728. Where[3] plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, it was held that they thereby made his cross-examination evidence in the cause; and as, in this cross-examination, he had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on his behalf of the agreement and its contents; and that, too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs to produce it. Again, in an action against a magistrate for assault and false imprisonment, the warrant of commitment which had been put in by the plaintiff was held to be proof on behalf of the defendant of the information recited in it;[4] and in an action against a sheriff, an undersheriff's letter which had been produced by the plaintiff to affect the defendant, was held to be some evidence also of certain facts stated therein, which tended to excuse the sheriff.[5]

§ 729. It seems on the whole, however, to be now tolerably clear that where a sheriff or bailiff seeks to justify a seizure as against any party but the execution debtor, he must produce both the writ of execution and the judgment, and he cannot be relieved from offering such proof by any recital in the warrant which his opponent may put in evidence.[6]

[1] Pennell *v.* Meyer, 1838, 2 M. & Rob. 98.

[2] Id.

[3] Goss *v.* Quinton, 1842, 12 L. J. C. P. 173.

[4] Haylock *v.* Sparke, 1853, 22 L. J. M. C. 67. This case seems to overrule Stevens *v.* Clark, 1842, 2 M. & Rob. 435.

[5] Haynes *v.* Hayton, 1828, 6 L. J. K.B. (o.s.) 231; recognised in Bessey *v.* Windham, 1844, 14 L. J. Q. B. 7.

[6] White *v.* Morris, 1852, 21 L. J. C. P. 185; Glave *v.* Wentworth,

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§ 730. § 730. The rule requiring the whole statement containing the admission to be taken together, has long prevailed to a considerable extent in equity. Therefore, where a defendant had been examined on two days before commissioners of the Court of Bankruptcy, and the plaintiff read the examination taken on the first day, he was compelled to read that also which was taken on the second day;[1] and where a plaintiff in equity read that part of the defendant's account-book which charged the latter, the defendant was allowed to read the discharging part as evidence for himself.[2] With respect, however, to the old *answers* and *examinations in Chancery*,—which have now been superseded by *statements of defence* and *answers to interrogatories*,—the equity rule was far less comprehensive than that which was recognised at common law; and although, if a party in equity admitted, in his examination or answer, that he had received a sum, and then added in the same sentence that he had immediately paid it away,—or if he stated in a still more general form, that a person gave him 100*l.* as a present,—the charge and the discharge would be so blended together that the one could not be admissible without the other;[3] still, if he once admitted the receipt of money as an independent fact, he could not refer to other parts of his examination or answer, much less to affidavits sworn by him, or to schedules attached to his answer, for the purpose of showing that he had liquidated the amount so admitted to have been received, by separate and independent payments.[4] So, if a plaintiff read a passage in the answer, as evidence of a particular fact, the defendant could not read other parts, even though grammatically connected with such passage by conjunctive particles, unless they were really explanatory of its meaning.[5] If, in order to understand the sense of the passage on which the

1844, 6 Q. B. 173, n.; Martin *v.* Podger, 1770, 5 Burr. 2631; Lake *v.* Billers, 1698, 1 Ld. Raym. 733. See, also, Bowes *v.* Foster, 1858, 26 L. J. Ex. 262. See, however, contra, Bessey *v.* Windham, 1844, 14 L. J. Q. B. 7; and see, also, Ogden *v.* Hesketh, 1849, 2 C. & K. 772.

[1] Smith *v.* Biggs, 1832, 2 L. J. Ch. 161.

[2] Carter *v.* Ld. Coleraine, 1740, cited 2 Ball. & B. 384; Blount *v.* Burrow, 1792, 5 Brown C. C. 75.

[3] Ridgway *v.* Darwin, 1802, 7 Ves. 404; Thompson *v.* Lambe, 1802, 7 Ves. 588; Robinson *v.* Scotney, 1816, 19 Ves. 584. See, also, Awdley *v.* Awdley, 1690, 2 Vern. 194; Hampton *v.* Spencer, 1693, 2 Vern. 288; Freeman *v.* Tatham, 1846, 15 L. J. Ch. 323.

[4] Cases cited in last note.

[5] Davis *v.* Spurling, 1829, 15 L. J. Q. B. 56.

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plaintiff relied, it was necessary to read on the part of the defendant other portions of the answer, these portions would be evidence only so far as they were explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction, would be considered as not read.[1] This rule seems to have been adopted in consequence of the subtle contrivances of equity draftsmen, whose skill formerly consisted in so grammatically blending important points of the defendant's case with admissions that could not be withheld, as to render it necessary that both should be read in conjunction, and thus to prove their client's case by means of his own unsupported statements.[2]

§ 731. In accordance with the practice in equity as explained in the preceding section, it now is provided,[3] that "any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."[4]

§ 732. The whole of a document may, as a general rule, be read by the one party when the other has already put in evidence a partial extract.[5] But this rule will not warrant the reading of *distinct entries* in an account-book,[6] or distinct paragraphs in a newspaper,[7] unconnected with the particular entry or paragraph relied on by the opponent; nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation books, or a series of copies of letters inserted in a letter-book, merely because

[1] Bartlett *v.* Gillard, 1826, 6 L. J. Ch. 19.

[2] Gr. Ev. § 13.

[3] By R. S. C. Ord. XXXI. r. 24.

[4] "Of course when an admission is read, everything ought to be read which is fairly connected with that admission; but I think it would be wrong for the defendant, and he would not be allowed to try, to bring in matter which was not in any way connected with the matter admitted." Cotton, L.J., in Lyall *v.* Kennedy, 1884, 27 Ch. D. p. 15.

[5] R. *v.* Queen's Cy. JJ., Re Feehan, 1882, 10 L. R. Ir. 294.

[6] Catt *v.* Howard, 1820, 3 Stark. 3; Reeve *v.* Whitmore, 1865, 2 Dr. & Sm. 446.

[7] Darby *v.* Ouseley, 1856, 25 L. J. Ex. 227.

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§§ 732—734.

the adversary has read therefrom one or more papers, or entries, or letters.[1] If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books may throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not; and moreover the light may be a false one.[2]

§ 733. A similar rule prevails in the case of a *conversation*, in which several distinct matters have been discussed. If a part of a conversation is relied on as an admission, the adverse party can give in evidence *only* so much of the same conversation as may explain or qualify the matter already before the court.[3] For example, a witness who has acknowledged on cross-examination that he has heard the plaintiff admit on oath that he had repeatedly been insolvent, cannot be asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that certain money was given to him, and not lent.[4]

§ 734. With regard to *letters*, a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production.[5] For, in such a case, the letters, to which those put in were answers, are in the adversary's hands, and he may produce them if he thinks them necessary to explain the transaction.[5] This is the strict rule, but in practice if a party reads a letter from his opponent and is in possession of a copy of his own letter to which the opponent's is an answer, he is expected to read both. If a plaintiff puts in a letter by the defendant, on the back of which is something written by himself,

[1] Sturge *v.* Buchanan, 1839, 2 P. & D. 573.

[2] Id. (Ld. Denman).

[3] It was at one time held, on high authority, that if a witness were questioned as to a statement made by an adverse party, such party might lay before the court all that was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit (The Queen's case, 1820, 2 B. & B. 287 (Abbott, C.J.), H. L.); but a sense of the extreme injustice that might result from allowing such a course of proceeding has induced the courts, in later times, to adopt the stricter rule stated in the text: Prince *v.* Samo, 1838, 7 L. J. Q. B. 123.

[4] Prince *v.* Samo, 1838, 7 L. J. Q. B. 123.

[5] Ld. Barrymore *v.* Taylor, 1795, 1 Esp. 326; De Medina *v.* Owen, 1850, 3 C. & K. 77.

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the defendant is entitled to have the whole read;[1] and where a defendant laid before the court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence.[2]

§ 735. Questions not unfrequently arise as to the admissibility of letters, account-books, &c., which are tendered as admissions, in cases where their existence or contents have been discovered by means of a compulsory examination or answer of the party either in previous bankruptcy proceedings, or in some other legal inquiry; and it is often contended in such cases that the documents referred to therein cannot be read, without first producing the examination or answer. But—whatever the correct doctrine may be with respect to documents referred to in and *actually annexed* to an examination or answer—no rule of law will, in other cases, compel a party to treat the document on which he relies as part of a previous examination or answer.[3]

§ 736. It is even doubtful whether, if a document be annexed to an old answer in Chancery, the answer need be read, if it have no connection with the cause in which the document is produced.[4] If, however, the letter in question be not written by the party against whom it is offered, though contained in the schedule of his answer, and if it be merely used against him, as raising an inference from possession that he knew of its contents, and had acted upon it, common fairness requires[5] that the letter should not be read without the answer; for the answer of the party might contain such an explanation of the circumstances under which the letter came into his possession, as also such a contradiction of any passages in it which seemed to bear against his rights, as utterly to neutralise its effect. If, in making a verbal admission, a person refer to a written paper, without which the admission is incomplete, such paper must be produced, before the statement can be used as evidence against him.[6]

[1] Dagleish *v.* Dodd, 1832, 5 C. & P. 238.

[2] Roe *v.* Day, 1836, 7 C. & P. 705.

[3] Long *v.* Champion, 1831, 2 B. & Ad. 284; Sturge *v.* Buchanan, 1839, 2 P. & D. 573; overruling previous Nisi Prius decisions in Yates *v.* Carnsew, 1828, 3 C. & P. 99; Holland *v.* Reeves, 1835, 7 C. & P. 705.

[4] Long *v.* Champion, 1831, 2 B. & Ad. 284.

[5] Hewitt *v.* Piggott, 1831, 5 C. & P. 75 (Tindal, C.J.).

[6] Jacob *v.* Lindsay, 1801, 1 East,

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§§ 737—739.

§ 737.[1] Where an admission, whether oral or in writing, contains matters stated *as mere hearsay*, it is questionable whether such matters can be received in evidence. If tendered *against* the party making the statement, they would seem (like hearsay declarations against interest[2]) to be inadmissible unless coupled with a simultaneous statement by the party who has made the admission that he believes such hearsay to be true, and at any rate they are entitled to very little weight. When they are offered *in favour* of the party making the admission they would appear to be equally inadmissible or worthy of weight. This is on the ground that one party, by reading a part of the answer which his opponent had pleaded to a bill filed for discovery, "makes the whole admissible only so far as to waive any objection to the competency of the party making the answer, and he does not thereby admit as evidence all the facts which happened to have been stated therein by way of hearsay only."[3] On the other hand, it may perhaps be successfully urged, that since an answer is offered as the admission of the party against whom it was read, the whole should be laid before the jury, for the purpose of showing under what impressions the admission was made, though some part of it were stated only upon hearsay and belief.

§ 738. The rule requiring the whole of an admission to be taken together is so important, that a judge will always do well to explain distinctly to the jury its bearing and extent, whenever any portion of it is favourable to the party against whom a statement is read; but his neglecting to do so in a case where it is clear that the jury, in fact, took the whole into their consideration, will not amount to such a misdirection as to warrant a new trial.[4]

§ 739. A second rule respecting admissions is, that they are receivable in evidence *though they relate to the contents of a written instrument*, even when such contents are directly in issue.[5] This rule has already been discussed, and it is therefore needless to do more here than thus shortly to refer to it.[6]

460; Falconer *v.* Hanson, 1808, 1 Camp. 171.

[1] Gr. Ev. § 202, in part.

[2] As to which see Ld. Trimlestown *v.* Kemmis, 1843, 9 Cl. & Fin. 763 (H. L.); ante, § 685.

[3] Roe *v.* Ferrars, 1801, 2 Bos. & P. 548. See, also, Kahl *v.* Jansen, 1812, 4 Taunt. 565.

[4] Beckham *v.* Osborne, 1843, 6 M. & Gr. 771.

[5] Slatterie *v.* Pooley, 1840, 10 L. J. Ex. 8.

[6] Ante, §§ 410—415. See, also,

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§ 739A. A third rule as to admissions, is that any *verbal* admissions or declarations of the parties *which are not put directly in issue by the pleadings*, and which, consequently, have not been open to explanation or disproof, must be rejected, or at any rate must not be relied upon.[1] This rests upon the ground, that under such circumstances the reception of evidence would facilitate the production of false testimony.[2] The rule does not strictly extend to *written* admissions; yet the fact of their not being put in issue by the pleadings will naturally detract from their weight, as the party against whom they are offered in evidence will, in such case, have had no opportunity of explaining them.[3]

§ 740.[4] With respect to the *persons, whose admissions may be received*, the general doctrine is, that the declarations of a *party to the record*, or of one *identified in interest with him*, are, as against such party, receivable in evidence.[5] Declarations proceeding from a stranger, who is still living, are, however, almost uniformly rejected;[6] and, though the declarant be dead, his declarations can in general only be admitted upon some of the special grounds already considered.[7] The admissions of parties to the record are receivable in evidence whether made before or after the party had arrived at full age: and, therefore, in an action against an adult for necessaries supplied during his minority, admissions made, and letters written by him while under age, may be proved on behalf of the plaintiff.[8]

§ 741. The courts, however, now recognise a wide distinction between *nominal* and *real* parties. Therefore, if a consignee use the name of the consignor in proceeding against a shipowner, or if the assignee of a bond sues the obligor in the name of the original

ante, § 413, as to the admissibility of a confessio juris.

[1] Austin *v.* Chambers, 1837, 6 Cl. & Fin. 1 (H. L.); Attwood *v.* Small, 1838, 6 Cl. & Fin. 234; Copland *v.* Toulmin, 1840, 7 Cl. & Fin. 350.

[2] Austin *v.* Chambers, 1838, 6 Cl. & Fin. 1.

[3] McMahon *v.* Burchell, 1846, 2 Ph. 127; Crosbie *v.* Thompson, 1847, 11 Ir. Eq. R. 404; Swift *v.* M'Tiernan, 1848, 11 Ir. Eq. R. 602; Malcolm *v.* Scott, 1850, 5 Ex. 601; and see Margareson *v.* Saxton, 1835, 1 Y. & C. Ex. 529; Fitzgerald *v.* O'Flaherty, 1827, 2 Moll. 394, *n.*; and Stewart *v.* Gladstone, 1878, 7 Ch. D. 394.

[4] Gr. Ev. § 171, in part.

[5] Spargo *v.* Brown, 1829, 9 B. & C. 935.

[6] Barough *v.* White, 1825, 4 B. & C. 328. As to when they are admissible, see post, §§ 759—765.

[7] Ante, § 607.

[8] O'Neill *v.* Read, 1845, 7 Ir. L. R. 434. See 37 & 38 V. c. 62.

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§§ 741—743.

obligee, or if a cestui que trust brings an action in the name of his trustee, Courts of Nisi Prius, recognising the principles of equity, will reject the admission of the nominal plaintiff as evidence for the defendant.[1] For example, although a receipt in full may have been given by the nominal plaintiff to the defendant, the parties really interested may show that the money has in fact never been paid:[2] and if a release from a nominal plaintiff were pleaded in bar, a prior assignment of the cause of action, with notice thereof to the defendant, and an averment that the suit was prosecuted by the assignee for his own benefit, would be a good answer. The nominal plaintiff is never permitted to, in any manner, injuriously affect the rights of his assignee in an action.[3]

§ 742. On the principle just stated, the declarations of a *next friend* or *guardian* are not receivable in evidence against an infant plaintiff, since, though the names of these persons appear on the record, they are not really parties to the action, but merely officers of the court specially appointed to look after the interests of the infant.[4] A solemn admission may, however, be made in a pending suit, for the purpose of that trial only, by a guardian or next friend in good faith, and will be equally admissible with like admissions by the solicitor in the cause.[5]

§ 743. When several persons are *jointly* interested in the subject-matter of a suit, the general rule is, that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately;

[1] See Payne *v.* Rogers, 1785, 1 Doug. 407; Legh *v.* Legh, 1820, 1 B. & P. 447; Innell *v.* Newman, 1821, 4 B. & Ald. 419; Hickey *v.* Burt, 1816, 7 Taunt. 48; Mounstephen *v.* Brooke, 1819, 1 Chit. R. 390; Manning *v.* Cox, 1823, 7 Moore, C. P. 617; Barker *v.* Richardson, 1827, 1 Y. & J. 362; Johnson *v.* Holdsworth, 1835, 4 Dowl. 63. This is contrary to the practice which formerly prevailed at common law.

[2] See Wallace *v.* Kelsall, 1840, 10 L. J. Ex. 12; explaining Skaife *v.* Jackson, 1824, 3 B. & C. 421; and Farrar *v.* Hutchinson, 1839, 9 A. & E. 641.

[3] See Welch *v.* Mandeville, 1816, 1 Wheat. 233 (Am.); Mandeville *v.* Welch, 1820, 5 Wheat. 277 (Am.).

[4] Eccleston *v.* Speke, alias Petty, 1689, Carth. 79; Cowling *v.* Ely, 1818, 2 Stark. R. 366; Webb *v.* Smith, 1824, 1 C. & P. 337; Morgan *v.* Thorne, 1841, 10 L. J. Ex. 125; Sinclair *v.* Sinclair, 1845, 14 L. J. Ex. 109; Eccles *v.* Harrison, 1848, 6 Notes of Cases, Ecc. & Mar. 204. These cases overrule James *v.* Hatfield, 1734, 1 Str. 548. See Doe *v.* Roberts, 1847, 16 M. & W. 778, cited ante, § 605.

[5] See post, § 772.

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§§ 743, 744.

provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.[1] Accordingly, the representation or misrepresentation of any fact by one partner, with respect to some partnership transaction, will bind the firm;[2] if it appear on the record, that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, statements made by one of such proprietors are admitted on the part of the defendant,[3] and an admission by one of two joint and several obligors is evidence against the co-obligor, even though the joint defence raise a controversy as to the subject matter of the admission.[4]

§ 744. The Legislature has, however, greatly restricted the common law on this subject. For Lord Tenterden's Act[5] rendered mere verbal acknowledgment insufficient to take joint, or joint and several, debts out of the Statute of Limitations, by enacting that "in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments" contained in the old Statute of Limitations,[6] "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed *by the party chargeable thereby*." It also provides, "that where there shall be two or more joint-contractors, or executors, or administrators of any contractor, no such joint-contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them;[7] *provided always, that nothing herein*

[1] Whitcomb *v.* Whiting, 1781, 2 Doug. 652; Wood *v.* Braddick, 1808, 1 Taunt. 105.

[2] Rapp *v.* Latham, 1819, 2 B. & Ald. 795; Thwaites *v.* Richardson, 1790, Peake, R. 16; Nicholls *v.* Dowding, 1815, 1 Stark. R. 81; Lucas *v.* De la Cour, 1813, 1 M. & Selw. 249. "The Partnership Act, 1890" (53 & 54 V. c. 39), § 15.

[3] Kemble *v.* Farren, 1829, 3 C. & P. 623.

[4] Crosse *v.* Bedingfield, 1821, 12 Sim. 35.

[5] 9 G. 4, c. 14, § 1. See ante, § 600. Similar restrictions prevail in Ireland (see 16 & 17 V. c. 113, § 24), and in Massachusetts (see Rev. Stat. c. 120, § 14).

[6] 21 J. 1, c. 16 ("The Limitation Act, 1623").

[7] As to partners, see ante. §§ 600, 601.

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§§ 744, 745.

contained shall alter, or take away, or lessen the effect of, any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint-contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by (the Act of Jac. I.[1]) or this Act, as to one or more of such joint-contractors, or executors, or administrators, shall nevertheless be entitled against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."[2]

§ 745. This enactment having required that the written acknowledgment should be *personally* signed by the party chargeable, and having left untouched the law which allowed part payment by one of several co-debtors to operate as a bar of the statute with respect to the others, it was enacted by the Mercantile Law Amendment Act, 1856,[3] that[4] "an acknowledgment or promise made or contained by or in a writing signed by an *agent* of the party chargeable thereby, duly authorised to make such acknowledgment or promise shall have the same effect as if such writing had been signed by such party himself;" and by another section[5] that "when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the" Statutes of Limitations,[6] "so as to be chargeable in respect or by reason only of payment[7] of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors,

[1] Viz. 21 J. 1, c. 16 ("The Limitation Act, 1623").

[2] § 4 of 9 G. 4, c. 14, enacts, that the said Act of James, and that Act, "shall apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant."

[3] 19 & 20 V. c. 97, amended by 53 & 54 V. c. 39, and by 56 & 57 V. c. 71 ("The Sale of Goods Act, 1893").

[4] § 13.

[5] § 14. This section applies to § 24 of 16 & 17 V. c. 113 (Ir.), as well as to § 1 of Ld. Tenterden's Act. As to India, see the Indian Act, IX. of 1871, § 20, and Dinomoyi Debi v. Roy Luchmissut Singh, 1879, L. R. 7 Ind. App. 8 (P. C.).

[6] 21 J. 1, c. 16, § 3 ("The Limitation Act, 1623"); 3 & 4 W. 4, c. 42, § 3; 16 & 17 V. c. 113, s. 20 (Ir.).

[7] See Cockrill v. Sparkes, 1862, 32 L. J. Ex. 118.

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executors or administrators." With regard to acknowledgments and part payments by one of several executors it has been held that although co-executors are, under Lord Tenterden's Act and the Mercantile Law Amendment Act, not personally chargeable by reason of an acknowledgment or part payment by one of their number, such acknowledgment or part payment nevertheless keeps the debt alive as against the assets, and an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands of, or under the control of the other executors.[1]

§ 746. Under the Mercantile Law Amendment Act, where two partners had given a promissory note in the name of the firm, and one of them afterwards died, leaving his co-partner executor; the latter, after continuing to pay interest on the note for some years, became bankrupt; and, on a defence setting up the Statute of Limitations, in answer to a claim by the holder of the note against the assets of the deceased partner's estate, it was held that the payments must be presumed to have been made by the bankrupt in his character of surviving partner, and not as executor of his deceased partner.[2] It has also, under such enactment, been ruled that payment by one co-debtor, with the knowledge and mere consent of another, does not deprive that other of the benefit of the Statute of Limitations.[3]

§ 747. The Real Property Limitation Act, 1874,[4] which came into operation on the 1st of January, 1879, contains a provision[5]

In re Macdonald, [1897] 2 Ch. 181 (Stirling, J.). and see In re Hollingshead, 1888, 37 Ch. D. 651 (Chitty, J.).

Thompson *v.* Waithman, 1856, 26 L. J. Ch. 134.

[3] Jackson *v.* Woolley, 1858, 27 L. J. Q. B. 181. As to the effect of payment and acknowledgments by partners, see ante, §§ 600, 601.

[4] 37 & 38 V. c. 57.

[5] § 7. This enactment has been substituted for § 28 of 3 & 4 W. 4, c. 27 ("The Real Property Limitation Act, 1833"), and reduces the period of *twenty* years therein named to a period of *twelve* years—making no other alteration in the law—and is as follows:—"When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and, in such case, no such action or suit shall be

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respecting acknowledgments of a mortgagor's title by one of several mortgagees in possession, which is the same in principle as the enactments of Lord Tenterden's Act.

§ 748. Where a member of a partnership has been adjudged bankrupt, and an action brought, under the authority of the Court of Bankruptcy, in the joint names of the trustee and of the bankrupt's partner, the latter has no power to release the claim to which the action relates, but any attempted release by him[1] is expressly rendered void.[2]

§ 749. An admission made by one of several parties in *fraud* of the others jointly interested with him, and in collusion with the opponent, is, moreover, on these facts being shown, invalid as against the others.[3]

§ 750. To render the admission of one person admissible

brought but within *twelve* years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be *more than one mortgagee*, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such *acknowledgment, signed by one or more* of such mortgagees or persons, *shall be effectual only as against* the *party* or parties *signing* as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under, him or them, or any person or persons entitled to any estate or estates, interest or interests; to take effect after, or in defeasance of, his or their estate or estates, interest or interests; and *shall not operate to give to the mortgagor* or mortgagors a right to redeem the mortgage, *as against the person* or persons *entitled to any other undivided or divided part* of the money or land or rent: and where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." See Richardson *v.* Younge, 1871, L. R. 10 Eq. 275; L. R. 6 Ch. 478 (C. A.).

[1] By 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 113. It would probably be void even without express enactment. See next section, and supra, § 741.

[2] But the interest of the partner may be protected, "notice of the application for authority to commence the action must be given him," and if he claims no benefit therefrom, "he shall be indemnified against costs."

[3] See Rawstone *v.* Gandell, 1846, 15 L. J. Ex. 291; Phillips *v.* Clagett, 1843, 12 L. J. Ex. 275; ante, § 741.

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§§ 750, 751.

against another, it must relate to some matter in which either both were *jointly* interested, or one was interested *derivatively* through the other; and a *mere community of interest* will not be sufficient. Thus, the admission of a servant of a negligent act is no evidence against his master.[1] Again, if an action be brought against two persons in partnership as part-owners of a vessel, an admission by one, as to a matter which was not a subject of co-partnership, but only of co-part ownership, is inadmissible against the other:[2] and where two executors were sued as such on a covenant by a testator for quiet enjoyment, the plaintiff, to establish this fact, was not allowed to put in evidence a declaration by one of the defendants, to the effect that he and his co-defendant both had a lawful title *in their own right* through the testator,[3] since this admission had not been made by the party as executor, or in relation to any matter touching the testator's estate; but it simply referred to something of which the two defendants had taken advantage in their individual capacities. Indeed, it may even be doubted whether an express promise by one executor in his representative character will bind the remaining executors in their representative characters.[4] Certainly the admission of the receipt of money by one of several trustees, who were joint defendants, but were not personally liable, cannot be received to charge the others.[5]

§ 751.[6] On similar principles, where a joint contract is severed by the death of one of the contractors, nothing subsequently done or said by the survivor binds the personal representative of the deceased;[7] nor can the acts or admissions of one of several

[1] Johnson *v.* Lindsay, 1889, 53 J. P. 599 (Pollock, B., and Manisty, J.). But query this case. It is difficult to see why the evidence was not admissible as being part of the res gestæ. See ante, § 583.

[2] Jaggers *v.* Binnings, 1815, 1 Stark. R. 64. See Brodie *v.* Howard, 1855, 25 L. J. C. P. 57.

[3] Fox *v.* Waters, 1840, 12 A. & E. 43. See Stanton *v.* Percival, 1854, 24 L. J. Ch. 369.

[4] Tullock *v.* Dunn, 1826, Ry. & M. 416, cited with approbation by Parke, B., in Scholey *v.* Walton, 1844, 13 L. J. Ex. 122, questioning Atkins *v.* Tredgold, 1823, 2 B. & C. 23; and M'Culloch *v.* Dawes, 1826, 9 Dowl. & R. 40, contrà; and see In re Macdonald, [1897] 2 Ch. 181. As to acknowledgments and part payments of debts by executors, see ante, § 745.

[5] Davies *v.* Ridge, 1802, 3 Esp. 101.

[6] Gr. Ev. § 176, in part.

[7] Atkins *v.* Tredgold, 1823, 2 B. & C. 23; Fordham *v.* Wallis, 1852-3, 22 L. J. Ch. 548; Slaymaker *v.* Gundacker's Ex., 1823, 10 Serg. & R. 75 (Am.).

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§§ 751, 752.

executors bind any surviving executor;[1] nor the admissions of one tenant in common be receivable against his co-tenant.[2] Moreover, it has, in America, been decided, that no such privity exists among the members of a board of public officers,[3] or among several indorsers of a promissory note,[4] or between executors and heirs or devisees,[5] as to make the admission of one binding on all. Plainly, the admission of one defendant will not be evidence against any other in an action for negligence, or trespass, or other tort.[6] Still clearer is it that any such admission will not be evidence against another person in criminal proceedings, since the law cannot recognise any partnership or joint interest in wrong, much less in crime.[7]

§ 752. An exception to this last proposition at first sight appears to prevail, where the *inhabitants of townships*, counties, or other territorial divisions of the country, sue or are prosecuted eo nomine. But here such inhabitants are, in truth, regarded in the light of a corporation, of which each individual inhabitant forms a component part. Therefore the declarations and admissions of any one of such persons are, not really inconsistently with the rule just discussed, receivable in evidence against the collective body. Accordingly, the declarations of all rateable inhabitants, whether actually rated or not, may be given in evidence for the Crown, in a prosecution against a township for non-repair of a highway, while in a settlement case its opponents may give in evidence declarations by rated parishioners of a parish.[8] In both cases the value of such evidence will of course vary according to the knowledge and position of the declarant, and will in many instances be exceedingly slight.[9]

[1] Slater *v.* Lawson, 1830, 1 B. & Ad. 396: Hathaway *v.* Haskell, 1829, 9 Pick. 42 (Am.).

[2] And this even where both are parties to the suit, and in the same interest: Dan *v.* Brown, 1825, 4 Cowen, 483.

[3] Lockwood *v.* Smith, 1812, 5 Day, 309 (Am.).

[4] Slaymaker *v.* Gundacker's Ex., 1823, 10 Serg. & R. 75 (Am.).

[5] Osgood *v.* Manhattan Co., 1824, 3 Cowen, 612 (Am.). See, also, Fordham *v.* Wallis, 1852-3, 22 L. J. Ch. 548.

[6] Daniels *v.* Potter, 1830, M. & M. 501; Morse *v.* Royal, 1806, 12 Ves. 362. See R. *v.* Hardwick, 1809, 11 East, 585, where Ld. Ellenborough lays down the rule somewhat too loosely.

[7] Grant *v.* Jackson, 1793, Peake, R. 204.

[8] R. *v.* Hardwick, 1809, 11 East, 579; R. *v.* Whitley Lower, 1813, 1 M. & Selw. 636; R. *v.* Woburn, 1808, 10 East, 395.

[9] R. *v.* Adderbury East, 1843, 13 L. J. M. C. 9; R. *v.* Hardwick, 1809, 11 East, 585.

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§ 753.[1] An *apparently joint interest is* obviously *insufficient* to make the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy.* A foundation for such evidence must first be laid, by showing, primâ facie, that a joint interest exists. Consequently, where in an action against a party for money had and received, the plaintiff, to prove the receipt of the money by defendant, tendered certain statements, which had been made by a person whom the defendant had taken into partnership subsequently to the transaction in question, such evidence was rejected because a joint liability could not be presumed merely from a subsequent partnership.[2] The existence of a joint interest which is disputed cannot, moreover, be established by the admission of one of the parties sought to be charged, but must be shown by independent proof. Therefore, in an action against three alleged makers of a promissory note, the admission of his signature by one defendant was under the old law insufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be established against all being a joint promise by all;[3] and in an action seeking to charge several as partners, an admission of the partnership by one is not evidence of it which is receivable against any of the others; but it is only after such partnership is shown by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others.[4] The admissions are, however, evidence against the party making them, and *he* will be bound thereby, either in an action against him as surviving partner, or even in an action in which he is sued on the joint promise with his co-partners, in which they have let judgment go by default.[5]

§ 754. In general, statements in the defence, or in the answers to interrogatories,[6] of one defendant cannot be read in evidence

[1] Gr. Ev. § 177, in part.

[2] Catt *v.* Howard, 1820, 3 Stark. 3.

[3] Gray *v.* Palmers, 1794, 1 Esp. 135.

[4] Nicholls *v.* Dowding, 1815, 1 Stark. R. 81; Gibbons *v.* Wilcox, 1817, 2 Stark. R. 43; Grant *v.* Jackson, 1793, Peake, R. 204 (Ld. Kenyon); Van Reimsdyk *v.* Kane, 1813, 1 Gall. 630 (Am.); Harris *v.* Wilson, 1831, 7 Wend. 57 (Am.); Burgess *v.* Lane, 1824, 3 Greenl. 165 (Am.); Dutton *v.* Woodman, 1852, 9 Cush. 255 (Am.).

[5] Sangster *v.* Mazarredo, 1816, 1 Stark. R. 161; Ellis *v.* Watson, 1818, 11 Mass. 92.

[6] See Meyer *v.* Montriou, 1846, 9 Beav. 521; Stephens *v.* Heathcote, 1860, 29 L. J. Ch. 529; Parker *v.*

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§§ 754, 755. either for or against his co-defendant. The reasons for this are that, as there is no issue between the defendants, there can have been no opportunity for cross-examination;[1] and, moreover, if it were allowed, a plaintiff might, by making one of his friends a defendant, gain a most unfair advantage.[2] The rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence; nor to cases where they have a joint interest, either as partners or otherwise, in the transaction.[3] But wherever the admission of one party would be good evidence against another party, the defence of the former may à fortiori, be read against the latter.[4]

§ 755. There would appear to be little doubt but that statements made by parties suing or sued *in a representative character before they were completely clothed with that character*, are not admissible against them, so as to affect the interest of the persons they represent. Lord Tenterden ruled that they are not,[5] and it is submitted that he was correct. For it would be startling that the assets of a testator, and the consequent rights of legatees, might be affected by some inconsiderate statement made by the executor, before the death of the testator.[6] Even the sworn admission of a married woman, in answering a bill in Chancery jointly with her husband,—except so far as it related to her separate estate,[7]—has been rejected after his death, as against the wife, as it was considered as the answer of the husband alone.[8] Nor can the affidavit of a guardian of an infant defendant,[9] or

Morrell, 1848, 2 Phill. 453; Hoare *v.* Johnstone, 1838, 7 L. J. Ch. 207; Saltmarsh *v.* Hardy, 1873, 42 L. J. Ch. 422 (Ld. Selborne, C.).

[1] Jones *v.* Turberville, 1792, 2 Ves. Jun. 11; Morse *v.* Royal, 1806, 12 Ves. 362.

[2] Wych *v.* Meal, 1734, 3 P. Wms. 311.

[3] Petherick *v.* Turner, 1802, cited 1 Taunt. 105; Pritchard *v.* Draper, 1830-1, 1 Russ. & My. 191; Hilliard *v.* Phaley, 1723, 8 Mod. 180; Field *v.* Holland, 1810, 6 Cranch, 8 (Am.); Clark's Ex. *v.* Van Reimsdyk, 1815, 9 Cranch, 153 (Am.). See Parker *v.* Morrell, 1848, 2 Phill. 453, cited ante, § 599.

[4] Van Reimsdyk *v.* Kane, 1813, 1 Gall. 630 (Am.).

[5] Fenwick *v.* Thornton, 1827, M. & M. 51. See, also, Metters *v.* Brown, 1863, 32 L. J. Ex. 138; Plant *v.* M'Ewen, 1823, 4 Conn. 544 (Am.); contrà, Tindal, C.J., in Smith *v.* Morgan, 1839, 2 M. & Rob. 257.

[6] See Legge *v.* Edmonds, 1855, 25 L. J. Ch. 125, which confirms the law as stated in the text.

[7] Callow *v.* Howle, 1847, 17 L. J. Ch. 71; Clive *v.* Carew, 1859, 28 L. J. Ch. 685.

[8] Hodgson *v.* Merest, 1821, 9 Price, 563; Elston *v.* Wood, 1833, 2 Myl. & K. 678.

[9] Eccleston *v.* Speke, alias Petty, 1689, 3 Mod. 258; Hawkins *v.* Luscombe, 1818, 2 Swanst. 392; Story,

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§§ 755, 756.

of the committee of a lunatic,[1] be read against the infant or lunatic in another suit; though it may be used against the guardian or committee himself, if he afterwards be sued in his private capacity, for it is an admission upon his own oath.

§ 756.[2] Persons who are not formally parties to a record, but who are *interested in its subject-matter*, are considered by the law as real parties in interest, and accordingly their admissions have the same weight as though they were formally parties. For example, there may be received in evidence against their respective representatives the admissions of the cestui que trust of a bond, so far as his interest and that of the trustee are identical;[3] those of the persons interested in a policy effected in another's name for their benefit;[4] those of the shipowners, in an action by the master for freight;[5] those of the indemnifying creditor, in an action against the sheriff;[6] those of the deputy-sheriff tending to charge himself, in an action against the high sheriff for the misconduct of the deputy;[7] those of rated parishioners, in a settlement appeal, where the churchwardens and overseers of the poor are the nominal parties on the record;[8] and, in short, the admissions of any persons who are represented in the action by other parties.[9] On similar principles, the declarations of voters against their own votes, whether made

Eq. Pl. § 668; Gr. Ev. §§ 24, 323; Mills *v.* Dennis, 1818, 3 Johns. Ch. 367 (Am.). See ante, § 742.

[1] Beasley *v.* Magrath, 1804, 2 Sch. & Lef. 34 (Ir.).

[2] Gr. Ev. § 180, in part.

[3] Hanson *v.* Parker, 1749, 1 Wils. 257. See, also, Harrison *v.* Vallance, 1822, 1 Bing. 45; May *v.* Taylor, 1843, 12 L. J. C. P. 314.

[4] Bell *v.* Ansley, 1812, 16 East, 143 (Ld. Ellenborough).

[5] Smith *v.* Lyon, 1813, 3 Camp. 465.

[6] Dowden *v.* Fowle, 1814, 4 Camp. 38; Proctor *v.* Lainson, 1836, 7 C. & P. 631 (Ld. Abinger); Dyke *v.* Aldridge, 1798, cited 7 T. R. 665; Young *v.* Smith, 1808, 6 Esp. 121; Harwood *v.* Keys, 1832, 1 M. & Rob. 204.

[7] Snowball *v.* Goodricke, 1833, 4 B. & Ad. 541, questioning the language of Ld. Kenyon and Lawrence, J., in Drake *v.* Sykes, 1797, 7 T. R. 113, which seems to identify the sheriff with the under-sheriff to all intents: Yabsley *v.* Noble, 1697, 1 Ld. Ray. 190. The declarations of under-sheriffs, or of the sheriff's bailiffs, accompanying official acts, are admissible as parts of the res gestæ. See Jacobs *v.* Humphrey, 1834, 3 L. J. Ex. 82; Scott *v.* Marshall, 1832, 1 L. J. Ex. 97; North *v.* Miles, 1808, 1 Camp. 390; and ante, §§ 583 et seq.

[8] R. *v.* Hardwick, 1809, 11 East, 579; R. *v.* Whitley Lower, 1813, 1 M. & Selw. 636.

[9] In Hart *v.* Horn, 1809, 2 Camp. 92, an action of replevin, in which the declarations of the person, under whom the defendant made cognizance, were rejected (Heath, J.) as evidence for the plaintiff, is presumed not to be law. See Wellstead *v.* Levy, 1831, 1 M. & Rob. 139.

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§§ 756—758.

before or after the votes were given,[1] and even though invalidating such votes on the ground of their having received bribes,[2] are admissible in evidence; since, on a scrutiny, each case is considered as a separate cause in which the supporter of the vote under discussion and the voter are the parties on the one side, and the opposers of the vote are the parties on the other.[3]

§ 757. The declarations or admissions must, however, in all cases (as will presently be seen[4]), have been made while the party making them had some interest in the matter; and they, moreover, are receivable in evidence only so far as the declarant's own interests, or the interests of those who claim through him, are concerned. Thus, if an action be brought by trustees, who represent the interests of a variety of cestuis que trust, before the declaration of a cestui que trust will be admitted at all against a trustee, the nature of the interest of the declarant in the trust estate must be shown, so that it may clearly appear that he alone is entitled to the benefit resulting from the action,[5]—so that the statements of a person beneficially interested as tenant for life are, for instance, not evidence to prejudice the rights of the remainder-men in fee.

§ 758. In applying the above rule, a distinction exists between the position of a *tenant for life* and that of a *tenant in tail.* A tenant for life cannot—unless empowered by some special statute[6]—prejudice, by an admission, the interest of a remainder-man or reversioner. But a tenant in tail is regarded as representing the inheritance, and, therefore, what he says or does will often be binding on the persons entitled in remainder. Accordingly, a release of an equity of redemption by a tenant in tail in possession,[7] or a decree of foreclosure against him, will bind

[1] Southampton case, 1833, Cock. & R. 113; Ripon case, 1833, Cock. & R. 301; Petersfield case, 1833, Cock. & R. 34; New Windsor, 1835, Knapp. & O. 173; Ennis, 1835, Knapp. & O. 435; Droitwich, 1835, Knapp. & O. 64; Bedfordshire, 1785, 2 Luders, 411; and other cases cited 2 Rog. on Elect. 139.

[2] Ipswich, 1835, Knapp. & O. 387; and cases cited 2 Rog. on Elect. 139.

[3] 2 Rog. on Elect. 139.

[4] Post, § 794.

[5] Doe *v.* Wainwright, 1838, 8 A. & E. 700; May *v.* Taylor, 1843, 12 L. J. C. P. 314.

[6] See ante, § 692, note commencing "In Roddam *v.* Morley," and post, § 1088, note citing same case.

[7] Reynoldson *v.* Perkins, 1769, Amb. 563.

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the remainder-man;[1] and an acknowledgment by a tenant in tail of the existence of an equity of redemption which would, in the absence of such admission, have been barred by the equitable rule respecting limitations, has the effect, as against the remainder-man, of restoring the right of redemption.[2]

§ 759.[3] In some cases, admissions by *third persons, who are strangers to the suit*, are receivable. This is the case when the issue is substantially upon the mutual rights which, at the particular time of the admission, were respectively possessed by a party to the record and the person who made such admission; in which cases such evidence will in general be let in as would be legally admissible in an action between the parties themselves. Thus, in an action by his trustee, the admissions of a bankrupt, made before the act of bankruptcy, are receivable in proof of the petitioning creditor's debt;[4] but admissions made after the act of bankruptcy cannot furnish evidence against the trustee, because of the intervening rights of creditors, and the danger of fraud.[5]

§ 760.[6] The admissions of a third person are also receivable against, and binding upon, a person who has *expressly referred another to him* for information. Thus, executors who wrote to a plaintiff, that if she wished for further information on a certain subject, she should apply to a certain merchant in the city, were held bound by the replies of the merchant;[7] where the fact of the delivery of goods by a carman was disputed, a defendant who said, "If he will say that he delivered the goods, I will pay for them," was held bound by the affirmative reply of the carman.[8]

§ 760A.[9] It of necessity follows that where a person refers to another, who thereupon makes a statement *in his presence*, proof

[1] Pendleton *v.* Rooth, 1859, 29 L. J. Ch. 265.

[2] Id.

[3] Gr. Ev. § 181, in part.

[4] See Coole *v.* Braham, 1848, 18 L. J. Ex. 105.

[5] Hoare *v.* Coryton, 1812, 4 Taunt. 560; Robson *v.* Kemp, 1803, 4 Esp. 234; Watts *v.* Thorpe, 1808, 1 Camp. 376; Smallcombe *v.* Bruges, 1824, McClel. 45; Taylor *v.* Kinloch, 1819, 1 Stark. R. 175. These cases virtually overrule Dowton *v.* Cross, 1794, 1 Esp. 168. See, also, Bernasconi *v.* Farebrother, 1832, 3 B. & Ad. 372. Of course, even such admissions are still evidence against the bankrupt himself: Jarrett *v.* Leonard, 1814, 2 M. & Selw. 265.

[6] Gr. Ev. § 182, almost verbatim.

[7] Williams *v.* Innes, 1808, 1 Camp. 364.

[8] Daniel *v.* Pitt, 1808, Peake, Ad. Cas. 238; Brock *v.* Kent, 1807, 1 Camp. 366 *n.*; Burt *v.* Palmer, 1803, 5 Esp. 145; Hood *v.* Reeve, 1828, 3 C. & P. 532.

[9] Gr. Ev. § 104, in great part.

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§§ 760a—762. of such statement is undoubtedly good evidence.[1] Whether the answer of a person thus referred to is *conclusive* against the party seems, however, not to have been finally settled. As a general rule it ought to be held that a party who refers to another is conclusively bound by that other's decision; for to make a proposition to be bound by what another may say, and after he has spoken to recede from it, is not only dishonest, but might be turned to very improper purposes, such as to entrap a witness, or to find out how far the party's evidence would go in support of his case.[2] In such cases the purposes of justice and policy are sufficiently answered, by (as in the case of any award) throwing the burthen of proof on the party questioning the decision, and holding him bound, unless he can impeach the test referred to by clear proof of fraud or mistake.[3]

§ 761. These principles apply whether the question referred be one of law or of fact; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject; and whatever the nature of the action in which the statements of the referee are proposed to be adduced in evidence. Accordingly, where two parties agreed to abide by the opinion of counsel upon the construction of a statute, the party against whose interest the opinion operated was held bound thereby;[4] and a disputed fact regarding a mine having been referred by consent to a miners' jury, their decision was afterwards received in evidence.[5]

§ 762. A tenant may even dispute his landlord's title if such landlord having to his knowledge agreed with a third person to leave it to counsel's opinion to say who is entitled to the demised

[1] R. *v.* Mallory, 1884, 13 Q. B. D. 33 (C. C. R.).

[2] Per Ld. Kenyon, in Stevens *v.* Thacker, 1793, Peake, R. 187; Lloyd *v.* Willan, 1794, 1 Esp. 178; Bretton *v.* Prettiman, 1666, T. Ray. 153; Delesline *v.* Greenland, 1795, 1 Bay, 458 (Am.), where the oath of a third person was referred to. But in Garnet *v.* Balls, 1822, 3 Stark. R. 160, on a question whether a horse in defendant's possession was identical with one lost by plaintiff, the plaintiff having said that if the defendant would take his oath that the horse was his, he should keep him; and he having made oath accordingly; Lord Tenterden observed, that, considering the loose manner in which the evidence had been given, he would not receive it as conclusive, though it was a circumstance on which he should not fail to remark to the jury.

[3] Whitehead *v.* Tattersall, 1834, 1 A. & E. 491.

[4] Price *v.* Hollis, 1813, 1 M. & Selw. 105. See, also, Downs *v.* Cooper, 1841, 11 L. J. Q. B. 2.

[5] Sybray *v.* White, 1836, 5 L. J. Ex. 173.

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property, counsel has decided that the third person is entitled, and the tenant has accordingly attorned to such third person.[1] §§ 762—764-5.

§ 763. To render the declarations of a person referred to admissible it is not necessary that the reference should have been made by express words; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. For instance, if a party, questioned by means of an interpreter, give answers through the same medium, the language of the interpreter is considered as that of the party; and may, consequently, be proved by any person who heard it, without calling the interpreter himself;[2] if a party, on motion before a judge, use the affidavit of another person to prove a certain fact deposed to therein, such affidavit is, on any subsequent trial, evidence as against him of this fact, and that, too, though the person who made the affidavit is present in court:[3] so, evidence taken on commission in a suit to perpetuate testimony and used in that suit by a predecessor in title to a party is admissible in evidence against that party on the ground that the predecessor in title by using it and by putting it forward as a true statement of the particular fact had adopted it as his own;[4] and where a petitioning creditor, knowing that his servant could prove a particular act of bankruptcy, sent him expressly for that purpose to be examined at the opening of the fiat, the depositions then made were held evidence of the act of bankruptcy as against the petitioning creditor on an issue as to that fact in a subsequent action between him and the representatives of the bankrupt's estate.[5]

§§ 764-5. A party is not bound, however, by what his witness says at Nisi Prius.[6]

[1] Downs *v.* Cooper, 1841, 11 L. J. Q. B. 2. In such cases as the above, if the decision be written, and do not contain any recital of the agreements, it does not on the face of it purport to be an award, and is accordingly admissible in evidence without being stamped as such. See cases previously cited.

[2] Fabrigas *v.* Mostyn, 1776, 20 How. St. Tr. 122, 123.

[3] Brickell *v.* Hulse, 1837, 7 A. & E. 456; Boileau *v.* Rutlin, 1848, 2 Ex. 678; Pritchard *v.* Bagshawe, 1851, 20 L. J. C. P. 161; Johnson *v.* Ward, 1806, 6 Esp. 47. But see White *v.* Dowling, 1845, 8 Ir. L. R. 128.

[4] Evans *v.* Merthyr Tydvil Urban Council, 1899, 1 Ch. 241.

[5] Gardner *v.* Moult, 1839, 10 A. & E. 464; Boileau *v.* Rutlin, 1848, 2 Ex. 678.

[6] Gardner *v.* Moult, 1839, 10 A. & E. 464; Brickell *v.* Hulse, 1837, 7 A. & E. 456. See, also, ante, § 469. Yet, in one case (Cole *v.* Headley,

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§§ 766—767.

§ 766. It remains to consider the effect of *admissions by married women* when offered in evidence, either against herself or her trustees, or for or against her husband.

§ 766A. If *a wife sue or be sued as a single woman*, no valid reason can be given why her admissions should not have the same legal effect *against* her as those of any other person.[1]

§ 766B. Again, if the *trustees of a married woman sue or be sued*, and the opposite party be a stranger, the married woman's admissions will, like those of an ordinary cestui que trust,[2] be clearly admissible as against the trustees.

§ 766C. Where a wife and her husband have hostile interests, the wife's admissions ought to be received on his behalf to the same extent as her vivâ voce testimony; for the principle of policy which admits the one should equally admit the other. Thus, in an action against a husband by the trustees of his wife under a separation deed for arrears of maintenance, the defence to which is adultery by the wife, proof of her admission of criminal misconduct ought, it is submitted,—contrary to what was formerly the law,—to now be received.[4]

§ 767. The admissions of a wife cannot, however, be received in evidence *for her husband* in any suit between him and a stranger, unless, perhaps, in the single event of their constituting part of the res gestæ.[5]

1840, 11 A. & E. 807, in an action for trespass to a close, the deposition of a witness whom the plaintiff had called in a previous proceeding *before magistrates* for an alleged previous trespass to the same close, but who had then disproved plaintiff's possession of such close, was allowed to be read against the plaintiff. This was probably because the depositions were secondary evidence of oral testimony (as to which see ante, § 464), the witness being abroad at the time, and the question previously disputed before the magistrates and that then being tried, being identical. Still, the case *may* possibly have been decided on the ground stated in § 763, though it is not the best ground on which to support it.

[1] See Walton *v.* Green, 1825, 1 C. & P. 621, showing that a woman's admission that she is married is inadequate to prove the fact *on her behalf*. In accordance with this principle, in Wilson *v.* Mitchell, 1813, 3 Camp. 393, where the defence to an action on contract was that the plaintiff was under coverture when the cause of action accrued, Lord Ellenborough is reported to have held—on what grounds it does not appear—that it was not sufficient to show that she had acknowledged herself to be married, without proof of an actual marriage, or at least of cohabitation.

[2] See ante, § 756.

[3] See 16 & 17 V. c. 83.

[4] Scholey *v.* Goodman, 1823, 1 Bing. 349.

[5] See Walton *v.* Green, 1825, 1 C. & P. 621. In the case cited, in an action against a husband for goods supplied, the defence being that the wife had committed adultery, the wife's confession of it was, indeed,

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§§ 768-9. In connection with this subject of how far a wife's admissions are evidence for her husband, it should be pointed out that in the Divorce Division of the High Court[1] a person's confession or admission is only evidence against that person himself. As against that person such confession or admission may be acted upon *even though there be no other evidence;* but it is not evidence against anyone else. Consequently, a wife's confession of having committed adultery with him is no evidence against a co-respondent, nor is a co-respondent's admission to this effect evidence against a wife.[2] Nevertheless, a wife's confession may be acted upon if the co-respondent admits the adultery, as he thereby makes an admission against interest.[3] But as the unfettered reception of such evidence might "open a wide door," the court looks with jealousy at confessions. The *weight* of the evidence in such cases is for the court, or for a jury if there be one.[4] Accordingly, following the old practice of the House of Lords' Committees, which existed when divorces were only obtainable by private Act of Parliament, and of the Ecclesiastical Courts, the present Divorce Court requires *corroboration* of a confession. It has been said that "corroboration" is the proof of some fact leading to the supposition that a witness has sworn truly upon the matter as to which he has given evidence.[5] In other words, "corroboration" is the proof of facts ejusdem generis with those deposed to by the witness.[6] The House of Lords, in proceedings upon *bills of divorce*, was in the habit of rejecting letters from the wife to the husband containing confessions of adultery,[7] unless they were offered in mere confirmation of circumstances which tended strongly to prove the defendant's guilt.[8] Under

§§ **768-9.**

admitted as evidence for the husband as part of the res gestæ. But that case is, as a whole, nevertheless submitted to be clearly bad law, since in such cases the real question is whether the wife had, in fact, committed adultery—not whether the husband had so reasonably suspected her of it that it had justified him in turning her out of doors (as he there had done).

[1] The Act of 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), and the Rules which regulate the practice of the court, are alike silent on this subject.

[2] Williams *v.* Williams, 1866, L. R. 1 P. & D. 29.

[3] Le Marchant *v.* Le Marchant, 1876, 45 L. J. P. D. & A. 43.

[4] Williams *v.* Williams, 1798, 1 Hagg. Cons. 304.

[5] Boulton's case, 1835, Milw. 36 (Ir.).

[6] Simmons *v.* Simmons, 1847, 1 Roberts, 566.

[7] Ld. Cloncurry's case, 1811, Macq. H. of L. Practice, 606.

[8] Doyly's case, 1830, Macq. H. of L. Practice, 654.

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§§ 768-9. these circumstances, however, such letters, if addressed to a stranger, or even to the husband's agent, were receivable in evidence, after proof that they were not written in consequence of any threat or promise, and that the writer was then living apart from her husband;[1] and the wife's oral confession of guilt to a third party was also admissible under like circumstances.[2] Not only, however, were direct confessions rejected in the House of Lords, except under the circumstances above stated, but all letters written by the wife after her separation, either to the husband or to the adulterer, were generally held inadmissible, unless they were connected with some particular fact,[3] or could be referred to as part of the res gestæ,[4] or were tendered in evidence after a primâ facie case of guilt had been already established.[5] In the *Ecclesiastical Courts*, moreover, also formerly (and till they were abolished) the practice was similar to that of the House of Lords. A canon of 1603[6] rendered a mere confession, unaccompanied by other circumstances, insufficient to support a prayer for a separation a mensâ et thoro. This rule was there held applicable, though the confession was made under the apprehension of approaching dissolution, and was free from all suspicion of a collusive purpose.[7] Nevertheless a confession was always admissible in evidence, and, if coupled with other facts of a suspicious nature, generally proved an important ingredient in the decision of the court.[8] It was never

[1] Ld. Cloncurry's case, 1811, Macq. of L. Practice, 606.

[2] Ld. Ellenborough's case, 1830, Macq. H. of L. Practice, 655. But see Wiseman's case, 1824, Macq. H. of L. Practice, 631.

[3] Dundas's case, 1814, Macq. H. of L. Practice, 610.

[4] Boydell's case, 1830, Macq. H. of L. Practice, 651.

[5] Robinson *v.* Robinson, 1858, 27 L. J. P. & M. 91. In one case, where the husband held a situation at Malta, and his wife, in consequence of bad health, had left the island, and had resided in England for several years, during which time she had lived with a paramour and had borne him four children, the House of Lords admitted a series of letters from the wife to her husband, which were tendered as accounting for the circumstance of her not going out to rejoin him, and as showing that she had practised upon him the grossest deceit: Miller's case, 1817, Macq. H. of L. Practice, 620.

[6] No. 105.

[7] Mortimer *v.* Mortimer, 1820, 2 Hagg. Cons. 316.

[8] In one case, letters from the wife to the supposed paramour, taken in conjunction with other suspicious circumstances, were, in the absence of direct proof, even considered to establish her guilt, though they contained no express avowal of adultery, and though they never reached the hands of the party to whom they were addressed, as they were intercepted by the husband: Grant *v.* Grant, 1839, 2 Curt. 16; Caton *v.*

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settled in these courts, however, whether a wife's confession of adultery would be sufficient in itself to repel a suit instituted by her for restitution of conjugal rights.[1] They had, however, decided that in a suit asking for a decree of nullity of marriage, by reason of a former marriage, the defendant's simple admission of such former marriage was not sufficient.[2]

§ 770.[3] It remains to be considered how far the *admissions of the wife* will *bind* the husband. Generally such admissions only bind him where the wife had authority to make them.[4] Such authority does not result, by operation of law, from the mere relation of husband and wife. It is a question of fact, to be found by the jury, as in other cases of agency. For, though the relation of husband and wife is peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles of law which apply to it. The wife is, indeed, seldom expressly constituted the agent of the husband, and the cases, consequently, almost universally, turn upon the question of implied authority, resulting from the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question.[5]

Caton, 1849, 7 Notes of Cases, Ecc. & Mar. 28; Faussett *v.* Faussett, 1849, 7 Notes of Cases, Ecc. & Mar. 93. In the Ecclesiastical Courts, letters from the alleged paramour, found in the wife's possession, were admissible; but if they did not necessarily imply the commission of adultery, or were not supported by other evidence of indecent familiarities, they were insufficient to support a sentence of separation: Hamerton *v.* Hamerton, 1828, 2 Hagg. Ecc. R. 8. As to the admissibility of letters written by the adulterer to the wife, in proceedings before the H. of L., see Ld. Glerawley's case, 1821, Macq. H. of L. Practice, 629.

[1] Mortimer *v.* Mortimer, 1820, 2 Hagg. Cons. 310; Burgess *v.* Burgess, 1817, 2 Hagg. Cons. 227.

[2] Searle *v.* Price, 1816, 2 Hagg. Cons. 189.

[3] Gr. Ev. § 185, in great part.

[4] Emerson *v.* Blonden, 1794, 1 Esp. 142; Anderson *v.* Sanderson, 1817, 2 Stark. R. 204; Carey *v.* Adkins, 1814, 4 Camp. 92; Meredith *v.* Footner, 1843, 12 L. J. Ex. 183.

[5] See ante, § 192. For instance, where, under the old law (a married woman may now sue for wages in her own name, 45 & 46 V. c. 75, §§ 1, 2), the husband sued for her wages, the mere fact that she had earned them did not authorise her to bind him by her admissions of payment (Hall *v.* Hill, 1757, 2 Str. 1094); nor could her unauthorised declarations affect him, even where he sued with her in her right; for in these, and similar cases, the right was his own, though acquired through her instrumentality. Alban *v.* Pritchett, 1796, 6 T. R. 680; Kelly *v.* Small, 1799, 2 Esp. 716; Denn *v.* White, 1797, 7 T. R. 112, as to the wife's admission of a trespass. Neither are the husband's admissions as to facts respecting his wife's property, which

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§§ 771, 772.

§ 771. The inference of the wife's agency to contract or to make admissions from circumstances, used to be left to the jury with great latitude. For instance, they were once allowed to infer authority in the wife to accept a notice and direction, in regard to a particular transaction in her husband's trade, from her being seen twice in his counting-house appearing to conduct his business relating to that transaction, and once giving orders to the foreman;[1] and in an action against a husband for goods furnished to the wife while in the country, where he occasionally visited her, her letter to the plaintiff, admitting the debt, and apologising for the non-payment, though written several years after the transaction, was held, previously to Lord Tenterden's Act,[2] sufficient to take the case out of the Statute of Limitations.[3] But of later years, however, greater strictness has prevailed. Indeed, where a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, admissions made by her to the landlord of the shop respecting the amount of rent were held not admissible to bind the husband.[4]

§ 772.[5] The admissions of *solicitors* bind their clients in all matters relating to the progress and trial of the action. Sometimes they are even conclusive, and may be given in evidence upon a new trial, notwithstanding that, previously to such trial, the party has given notice that he intends to withdraw them, or though, where the alterations do not relate to the admissions,[6]

happened before the marriage, receivable after his death to affect the rights of the surviving wife: Smith *v.* Scudder, 1824, 11 Serg. & R. 325 (Am.).

[1] Plimmer *v.* Sells, 1834, 3 N. & M. 422.

[2] 9 G. 4, c. 14, § 1, which required that an acknowledgment, to take the case out of the statute, should be in writing, "signed by the party chargeable thereby." It may *now* be signed by an authorised agent: 19 & 20 V. c. 97, § 13, cited ante, § 745. See post, § 1073.

[3] Gregory *v.* Parker, 1808, 1 Camp. 394; Palethorpe *v.* Furnish, 1783, 2 Esp. 511 *n.*; Clifford *v.* Burton, 1829, 1 Bing. 199; Petty *v.* Anderson, 1825, 3 Bing. 170; Cotes *v.* Davis, 1808, 1 Camp. 485.

[4] Meredith *v.* Footner, 1843, 12 L. J. Ex. 183. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband, did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.

[5] Gr. Ev. § 186, in part.

[6] Elton *v.* Larkins, 1832, 1 M. & Rob. 196; Doe *v.* Bird, 1835, 7 C. & P. 6; Langley *v.* Ld. Oxford, 1836, 5 L. J. Ex. 166. See Hargrave *v.* Hargrave, 1850, 19 L. J. Ch. 261, as to the case where the client is an infant.

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§§ 772—774-82.

the pleadings have been altered. To have this effect, however, the admissions must have been distinct and formal, or such as are termed solemn admissions, made for the express purpose of relaxing the stringency of some rule of practice, or of dispensing with the formal proof of some document or fact at the trial.[1]

§ 773. Admissions made by solicitors, not indeed with the express intent of dispensing with proof of certain facts, but as it were *incidentally*, while they are referring to other matters connected with the action (which are generally the result of carelessness), are not regarded as conclusive admissions. But they, nevertheless, frequently raise an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove. Consequently, it is very important that solicitors should exercise great caution in the language they employ while corresponding with their opponents. For example, where in an action against the acceptor of a bill, defendant's solicitor served on the plaintiff a Notice to Produce, which contained a description of the bill corresponding with that set forth in the declaration, and then went on to say—"which said bill *was accepted by the said defendant*,"—such Notice was held primâ facie evidence of the defendant's acceptance;[2] in an action against the owners of a ship, their joint ownership was inferred from an undertaking to appear for them, signed by their solicitor, in which they were described as owners of the sloop in question;[3] and where, in an action of debt on a bond, the defendant's solicitor had admitted the signature of the attesting witness, this was held to amount by implication to an admission of the due execution of the instrument.[4]

§§ 774-82.[5] Admissions contained in the *mere conversation* of a solicitor, cannot, however, be received against a client, though they relate to the facts in controversy. The reason of this distinction is that a solicitor is merely given authority to manage the action in court, and to do nothing more.[6] And a letter sent

See cases cited in last note. Also, ante, § 724A, et seq.; and Young *v.* Wright, 1807, 1 Camp. 141; Doe *v.* Rollings, 1847, 17 L. J. C. P. 268.

[2] Holt *v.* Squire, 1825, Ry. & M. 282.

[3] Marshall *v.* Cliff, 1815, 4 Camp. 133.

[4] Milward *v.* Temple, 1808, 1 Camp. 375.

[5] Gr. Ev. § 186, in part.

[6] Petch *v.* Lyon, 1846, 15 L. J. Q. B. 393; Young *v.* Wright, 1807, 1 Camp. 141; Parkins *v.* Hawkshaw,

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§§ 774-82, 783. to the opposite party by a solicitor, expressed to be written "*without prejudice*," cannot be received as an admission, nor looked at on a question of costs;[1] neither can the reply be admitted, though not guarded in a similar manner.[2] However, an admission made before suit will be binding, if it be shown that the solicitor was already retained in the action,[3] though in the absence of any evidence of such retainer, some other proof must be given of authority to make the admission.[4] When the solicitor is retained in a cause, admissions made by his managing clerk, or his agent, are received as his own.[5]

§ 783. Admissions made by *counsel* stand on much the same footing as those by solicitors. Therefore, where a special case had been signed by the junior on each side, on a subsequent new trial, the production of the case was regarded as containing admissions by the parties of the facts therein stated.[6] As a general proposition indeed, both in the Chancery and Common Law Divisions of the High Court, a consent once given, or an admission once made, by counsel under his signature, with the authority of his client, with a full knowledge of the facts, and without some egregious mistake, is conclusively binding, and cannot afterwards be withdrawn:[7] and, after an admission has been made as to a fact, it is wrong to receive any evidence on the matter.[8] Moreover, where counsel on both sides so conduct a cause as to lead to an inference that a certain fact is admitted

1817, 2 Stark. R. 239; Doe *v.* Richards, 1845, 2 C. & Kir. 216. See Wilson *v.* Turner, 1808, 1 Taunt. 398; Watson *v.* King, 1846, 3 B. C. 608. Walker *v.* Wiltshire, infra.

[2] Paddock *v.* Forrester, 1842, 3 M. & Gr. 903; Hoghton *v.* Hoghton, 1852, 21 L. J. Ch. 482. See Jardine *v.* Sheridan, 1846, 2 C. & K. 24; Williams *v.* Thomas, 1862, 31 L. J. Ch. 674; Kurtz *v.* Spence, 1888, 57 L. J. Ch. 238; Walker *v.* Wiltshire, 1889, 23 Q. B. D. 335 (C. A.); and post, § 795.

[3] Marshall *v.* Cliff, 1815, 4 Camp. 133; Gainsford *v.* Grammar, 1809, 2 Camp. 9.

[4] Wagstaff *v.* Wilson, 1832, 4 B. & Ad. 339; Burghart *v.* Angerstein, 1834, 6 C. & P. 690; Pope *v.* Andrews, 1840, 9 C. & P. 564.

[5] Taylor *v.* Willans, 1831, 4 M. & P. 59; Standage *v.* Creighton, 1832, 5 C. & P. 406; Griffiths *v.* Williams, 1787, 1 T. R. 710; Truslove *v.* Burton, 1824, 9 Moore, C. P. 64; Taylor *v.* Forster, 1825, 2 B. & P. 195.

[6] Van Wart *v.* Wolley, 1823, Ry. & M. 4 (Abbott, C.J.); Edmunds *v.* Newman, 1823, Ry. & M. 5.

[7] Harvey *v.* Croydon Union, &c., 1884, Times, 14th Feb., C. A.; where, however, an authority was given by a client to counsel to refer an action expressly limited by certain instructions, and counsel agreed to refer without reference to such restrictions, the order of reference was set aside and the action reinstated: Neale *v.* Gordon-Lennox [1902], A. C. 465.

[8] Urquhart *v.* Butterfield, 1888, 37 Ch. D. 357 (C. A.).

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between them, the court or the jury may treat it as proved;[1] and though the counsel only assumed it with respect to one issue, the fact may be taken for granted for all purposes, and as to the whole case.[2] Accordingly, where plaintiff's counsel in his opening stated that his client had paid a particular cheque, but called no evidence in support of that fact, defendant was, after notice to produce, allowed to give secondary evidence of the contents of the cheque, without giving further proof of the plaintiff's possession, since if plaintiff had paid it he would get possession of it.[3]

§ 784. Where, however, on a second trial of a case, a party, having endeavoured to avoid part of his opponent's demand, by proving a mere statement made on the former trial, in his opponent's presence, by his counsel in his address, the judge rejected evidence of what had been then said.[4] It may be urged, in support of the above ruling, that statements made by counsel in the course of his address to the jury are often no other than embellishments of the imagination or suggestions prompted by his own ingenuity; and that as even bills in equity were formerly so regarded, and consequently were not evidence against the parties who filed them, much less ought parties to be bound by mere oral speeches of counsel, which the client has not even had the advantage of considering before they are delivered.[5]

§ 785.[6] The admissions of a *principal* can sometimes (though

[1] Stracy *v.* Blake, 1836, 1 M. & W. 168; Doe *d.* Child *v.* Roe, 1852, 22 L. J. Q. B. 102.

[2] Bolton *v.* Sherman, 1837, 6 L. J. Ex. 147.

[3] Duncombe *v.* Daniell, 1837, 1 W. W. & H. 101. But see Machell *v.* Ellis, 1845, 1 C. & K. 682.

[4] College *v.* Horn, 1825, 3 Bing. 119. The court in this case subsequently granted a further new trial on other grounds, the other members of it expressing no opinion as to the propriety of the course taken at the second trial, though Burrough, J., said that if the plaintiff was in court, and heard what his counsel said, and made no objection, he was bound by the statement. See R. *v.* Coyle, 1855, 7 Cox, C. C. 74; Haller *v.* Worman, 1860, 2 F. & F. 165. Sed qu. as to this last case.

[5] As to the authority of counsel to bind a client by a compromise or agreement made at the trial, see Swinfen *v.* Swinfen, 1857, 25 L. J. C. P. 303; 26 id. 97; Chambers *v.* Mason, 1858, 28 L. J. C. P. 10; Swinfen *v.* Ld. Chelmsford, 1860, 29 L. J. Ex. 382; Prestwich *v.* Poley, 1865, 34 L. J. C. P. 189; Strauss *v.* Francis, 1866, L. R. 1 Q. B. 379; Brady *v.* Curran, 1868, 2 Ir. C. L. R. 314; Holt *v.* Jesse, 1876, 3 Ch. D. 177; Davis *v.* Davis, 1880, 13 Ch. D. 861; Hickman *v.* Berens, 1895, 2 Ch. 638; Neale *v.* Gordon-Lennox, [1902] A. C. 465.

[6] Gr. Ev. § 187, in great part.

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§§ 785, 786.

only seldom) be received as evidence in an action *against the surety* upon his collateral undertaking. In such cases if the declarations of the principal were so made during the transaction of the business for which the surety was bound, as to become part of the res gestæ, they as such are admissible; but in any other event they are not.[1] For instance, where a surety has guaranteed payment for such goods as the plaintiffs should send to another in the way of trade, admissions by the principal debtor, made after the time of their supposed delivery, that he had received certain goods, are not any evidence against the surety;[2] neither are confessions of embezzlement made by the clerk or collector after his dismissal evidence against a man who became a surety for the faithful conduct of such clerk or collector in his office.[3]

§ 786.[4] The declarations of a principal may, in some cases, though rarely, be evidence against the surety. For instance, entries made by the principal debtor in the course of his duty, or whereby he has charged himself with the receipt of money, will, certainly, after his death,[5] and probably after he has absconded,[6] be received as evidence against the surety. Possibly, too, they are so if the defaulter be sued for his default, and thereupon gives his surety *notice of the pendency* of the suit upon which the surety requests him to defend it. In such a case judgment against the defaulter is conclusive evidence for the surety in a subsequent action by him against his principal (*i.e.*, the defaulter) for indemnity, inasmuch as the principal has thus *virtually become* a party to the suit. Accordingly, in an action by the sheriff against the surety of a bailiff, who had kept back money, a written admission by the bailiff of the receipt of this money was under these

[1] So, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him if he be sued by the creditor: Ex p. Young, re Kitchin, 1881, 17 Ch. D. 668.

[2] Evans *v.* Beattie, 1803, 5 Esp. 26; Bacon *v.* Chesney, 1816, 1 Stark. R. 192; Longenecker *v.* Hyde, 1813, 6 Binn. 1 (Am.).

[3] Smith *v.* Whittingham, 1833, 6 C. & P. 78. See, also, Cutler *v.* Newlin, 1819, Mann. Dig. N. P. 137; Dunn *v.* Slee, 1816, Holt, N. P. R. 401; Dawes *v.* Shed, 1818, 15 Mass. 6 (Am.); Foxcroft *v.* Nevens, 1826, 4 Greenl. 72 (Am.); Hayes *v.* Seaver, 1831, 7 Greenl. 237 (Am.); Beall *v.* Back, 1794, 3 Hard. & McHen. 242.

[4] Gr. Ev. § 188. in part.

[5] Whitnash *v.* George, 1828, 8 B. & C. 556; Middleton *v.* Melton, 1829, 10 B. & C. 322; Goss *v.* Watlington, 1821, 3 B. & B. 132; M'Gahey *v.* Alston, 1836, 6 L. J. Ex. 29.

[6] Abbeyleix Gdns. *v.* Sutcliffe, 1890, 26 L. R. Ir. 332 (diss. O'Brien, J.); Town of Union *v.* Bermes, 1882, 44 N. J. Law R. 269 (Am.).

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§§ 786, 787.

circumstances held to be evidence against the surety, the bailiff being considered as substantially the defendant in the action.[1]

§ 787.[2] The admissions of a person are also evidence against any other who is *in privity* with him. The term *privity* denotes mutual or successive relationship to the same rights of property; and privies are distributed in several classes, according to the manner of this relationship. Thus, there are privies in estate,—as, donor and donee, lessor and lessee, joint-tenants, and successive bishops, rectors, and vicars; privies in blood,—as, heir and ancestor, and coparceners; privies in representation,—as, executors and testators, administrators and intestates; privies in law,—where the law, without privity of blood or estate, takes the land from one and bestows it upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law.[3] The ground, upon which admissions bind those in privity with the party making them, is, that they are identified in interest; and of course the rule extends no further than this identity. The cases of coparceners, and of joint-tenants, are assimilated to those of joint promissors, partners, and others, having a joint interest, which have already been considered.[4] In other cases, where the party by his admissions has qualified his own right, and another claims to succeed him, as heir, executor, or the like, the latter succeeds only to the right as thus qualified at the time when his title commenced; and the admissions are receivable in evidence against the representative, in the same manner as they would have been against the party represented.[5] Thus, the declarations of the ancestor, that he held the land as tenant of a third person, are admissible to show that person's seisin in an action by him against the heir for the land;[6] and the declarations of an

[1] Perchard *v.* Tindall, 1795, 1 Esp. 394. The ground above suggested is in accordance with the ruling, and appears to be the only way in which it can be supported. A document saying, "discharge the defendant out of custody; I have received the money," signed by the bailiff, was there held to be for stamp purposes an authority, not a receipt, but sufficient to charge the witness (the bailiff) with the receipt of the money.

[2] Gr. Ev. § 189, in great part.

[3] Co. Lit. 271 a; Carver *v.* Jackson, 1830, 4 Pet. 83 (Am.); Wood, Inst. LL. Eng. 236; Tomlin, L. Dict. Verb. *Privies.* See Walker's case, 1586, 3 Co. Rep. 23; Beverley's case, 1603-4, 4 Co. Rep. 123; ante, § 90.

[4] Ante, § 743.

[5] Coole *v.* Braham, 1848, 18 L. J. Ex. 105.

[6] Doe *v.* Pettett, 1821, 5 B. & Ald. 223; 2 Poth., Obl., 254; ante, §§ 684—687, and cases there cited.

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§§ 787–789.

intestate are admissible against his administrator, or any other claiming in his right.[1]

§ 788.[2] On the same principle, any declaration by a landlord, in a prior lease concerning the estate, is evidence against a lessee, who claims by a subsequent title;[3] admissions—whether evidenced by writing,[4] such as letters, receipts, cases drawn for the opinion of counsel, answers in Chancery, or verbal statements, or even by conduct,[5]—made by former bishops, rectors, or vicars, with regard to their several rights, will be evidence against their respective successors, in all cases where the same rights are in question. Ancient maps, books of survey, and the like, though mere private documents, are frequently admissible on the ground that a privity in estate exists between the former proprietor under whose direction they were made, and the present claimant against whom they are offered;[6] and the declarations of former owners or occupiers, made while in possession, are admitted against those claiming in privity of estate as evidence of the nature and extent of their title.[7]

§ 789. In general, the naked declarations of a tenant will not be evidence against the reversioner.[8] Accordingly, the declarations of a former occupier of the defendant's land were held not to be

[1] Smith *v.* Smith, 1836, 3 Bing. N. C. 29. But the declarations of an executor, though made while he was acting in that capacity, are not admissible against a special administrator, who has been appointed in consequence of the executor's protracted absence from England: Rush *v.* Peacock, 1838, 2 M. & Rob. 162. There the administrator was appointed under 38 G. 3, c. 87. As to how far payments made by an executor de son tort to a creditor of a deceased person are binding on the rightful executor, see Thomson *v.* Harding, 1853, 22 L. J. Q. B. 448.

[2] Gr. Ev. § 189, in part.

[3] Crease *v.* Barrett, 1835, 4 L. J. Ex. 297. See Doe *v.* Seaton, 1834, 2 A. & E. 178.

[4] Bp. of Meath *v.* M. of Winchester, 1836, 3 Bing. N. C. 198; Maddison *v.* Nuttall, 1829, 6 Bing. 226; Doe *v.* Cole, 1834, 6 C. & P. 360; De Whelpdale *v.* Milburn, 1818, 5 Price, 485; Carr *v.* Mostyn, 1850, 19 L. J. Ex. 249.

[5] See Lady Dartmouth *v.* Roberts, 1812, 16 East, 334, where a vicar who had filed a bill against his rector and certain landowners of the parish for tithe hay, having abandoned the suit after the defendants in their answer had declared that the tithes in question belonged to the rector, in a subsequent action for similar tithes brought by a succeeding rector against owners, who had purchased their lands from the parties to the former suit, the answer was held to be strong evidence in favour of the plaintiff.

[6] Bridgman *v.* Jennings, 1699, 1 Ld. Raym. 734.

[7] Woolway *v.* Rowe, 1834, 3 L. J. K. B. 121; Doe *v.* Austin, 1832, 9 Bing. 41; Davies *v.* Pierce, 1787, 2 T. R. 53; Doe *v.* Jones, 1808, 1 Camp. 367; Jackson *v.* Bard, 1809, 4 Johns. 230 (Am.); Norton *v.* Pettibone, 1829, 7 Conn. 319 (Am.); Weidman *v.* Kohr, 1818, 4 Serg. & R. 174 (Am.).

[8] Tickle *v.* Brown, 1835, 4 A. & E. 378.

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admissible against him, on an issue whether the plaintiff had an easement in such land.[1] But in an action for the recovery of land, the admission of the tenant in possession will, from the peculiar nature of the proceedings, be evidence against one who defends as landlord.[2] And in one case the receipts of a lessee of vicarial tithes were held at Nisi Prius to be evidence, in proof of a modus, against the vicar, by reason of privity between them.[3]

§ 790.[4] In consequence of privity of estate between them, admissions *made by the assignor* of a personal contract or chattel previous to the assignment, where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer, bind such assignee. This, however, occurs only where an identity of interest exists between the assignor and assignee. Such identity is deemed to exist both when the assignee is either expressly or impliedly the mere agent and representative of the assignor,[5] and also whenever the assignee has acquired a title with actual notice of the true state of that of the assignor as qualified by the admissions in question, or where he has purchased a demand already stale, or otherwise infected with circumstances of suspicion.

§ 791.[6] Accordingly, in an action by the indorsee of a bill or note, which has been taken by the plaintiff either after it was due or with notice of fraud in its original concoction and without consideration, the declarations of the indorser made while the interest was in him, are admissible in evidence for the defendant.[7] But as "the right of a person holding by a good title is not to be cut down by the acknowledgment that he had no title," therefore the declarations of a *former* holder of a note, that such note was given without

[1] Scholes *v.* Chadwick, 1843. 2 M. & Rob. 507; Papendick *v.* Bridgwater, 1855, 24 L. J. Q. B. 289; but they may be evidence on other grounds, e.g., to show acts of ownership exercised by another person: see Blandy-Jenkins *v.* Dunraven, [1899] 2 Ch. 121.

[2] Doe *v.* Litherland, 1836, 4 A. & E. 784. See R. S. C. 1883, Ord. XII. rr. 25, 26.

[3] Jones *v.* Carrington, 1824, 1 C. & P. 329. See, also, Illingworth *v.* Leigh, 1800, 4 Gwillim. 1615.

[4] Gr. Ev. § 190, almost verbatim.

[5] Welstead *v.* Levy, 1831, 1 M. & Rob. 139; Harrison *v.* Vallance, 1822, 1 Bing. 45; Gibblehouse *v.* Strong, 1832, 3 Rawle, 437 (Am.); Hatch *v.* Dennis, 1833, 1 Fairf. 244 (Am.); Snelgrove *v.* Martin, 1822, 2 M'C. 241 (Am.).

[6] Gr. Ev. § 190, in part.

[7] Beauchamp *v.* Parry, 1830, 1 B. & Ad. 89; Peckham *v.* Potter, 1824, 1 C. & P. 232; Benson *v.* Marshal (undated), cited in Shaw *v.* Broom, 1824, 4 D. & R. 731; Shirley *v.* Todd, 1832, 9 Greenl. 83 (Am.).

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§§ 791, 792.

consideration, even though made while he held the note, are not admissible against an indorsee, to whom the instrument has been transferred for good consideration, and before it was overdue; because such an indorsee derives his title from the nature of the instrument itself, and not through the previous holder.[1]

§ 792. The principle that declarations by a person through whom the plaintiff claims are admissible is further illustrated by a case[2] in which an action was brought for taking three mares, and the defendant justified as lord of the manor under a heriot custom: the sole question between the parties being whether the tenant was possessed of the mares at the time of her death. Her declarations that she had given them to the plaintiff some time before were held admissible, as they were against her interest, and the right of the lord depended upon her title. Where, however, the issue does not distinctly raise the question whether the title of the party against whom declarations are tendered is dependent upon that possessed by the declarant, such declarations will be inadmissible. Therefore, where an issue was directed to try whether goods seized in A.'s house at the suit of the defendant *were the property of the plaintiff*, the declarations of A. respecting the property were rejected.[3] Had the issue raised the question, whether *at the time of the execution* the goods belonged to A., it would seem, on principle, that declarations of A. made before the seizure would have been evidence against the execution creditor (since, in an interpleader suit, the execution creditor ought to be considered as claiming under the debtor) when they *qualified* or

[1] Woolway *v.* Rowe, 1834, 1 A. & E. 116, explaining Barough *v.* White, 1825, 4 B. & C. 325; Smith *v.* De Wruitz, 1825, Ry. & M. 212; Beauchamp *v.* Parry, 1830, 1 B. & Ad. 89. In applying the principle indicated in the text, a note payable on demand, though not negotiated for some time after its date, will not on that account be treated as a note taken by an indorsee when overdue; for such notes are intended to be continuing securities, and may circulate for years without exciting suspicion: Barough *v.* White, 1825, 4 B. & C. 325; Brooks *v.* Mitchell, 1841, 11 L. J. Ex. 51. Neither will the circumstance that the declarations of the prior holder would, if received, prove his fraud in connection with the indorsee, render them admissible against the latter; because all preliminary facts, which are necessary to establish the admissibility of evidence, must be proved aliundè, before such evidence is received: Phillips *v.* Cole, 1839, 10 A. & E. 106. See Heenan *v.* Clements, 1850, 1 Ir. C. L. R. 44.

[2] Ivat *v.* Finch, 1808, 1 Taunt. 141.

[3] Stotherd *v.* James, 1843, 1 C. & K. 121.

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affected the debtor's title to the chattels in question.[1] In accordance with this view, on an interpleader issue between the holder of a bill of sale and an execution creditor, where the question was the usual one of fraud in the concoction of the bill of sale, the plaintiff was not allowed to support the genuineness of the instrument by giving evidence of an admission by the execution debtor that a debt was due from him to the plaintiff, though such admission was made prior to the assignment, and also in the absence of the defendant.

§ 793.[2] These admissions by third persons, through whom the person against whom they are received claims, as they derive their legal force from the relation of the party making them to the property in question, may be *proved by any witness* who heard them, without calling the party by whom they were made. The question merely is, whether the admission alleged was made, and not whether the fact is as then admitted. The truth of it may, where the admission is not conclusive,—and it seldom is so,—be controverted by other testimony, and even by calling the party himself; but it is not necessary to produce him, for his declarations, when admissible at all, will be received as original evidence, and not as hearsay.[3]

§ 794. With respect to *the time and circumstances* of the admission, it may first be observed, that whenever the declarations of a third person are offered in evidence, on the ground that the party against whom they are tendered derives his title from the declarant, it must be shown that they were made at a time when he had an interest in the property in question. For it would be manifestly unjust that a person, after having parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make.[4] Accordingly, the admission of a former party to a bill of

[1] Coole *v.* Braham, 1848, 18 L. J. Ex. 105. In this case a decision of Mr. Justice Wightman (in Prosser *v.* Gwillim, 1843, 1 C. & K. 95), rejecting the declarations of the execution debtor, on the ground that the execution creditor claimed *adversely* to him, is discredited.

[2] Gr. Ev. 191, almost verbatim.

[3] Ante, §§ 576, 602, 603, and cases there cited; Woolway *v.* Rowe, 1834, 3 L. J. K. B. 121; Brickell *v.* Hulse, 1837, 7 A. & E. 456.

[4] Doe *v.* Webber, 1834, 1 A. & E. 733; Foster *v.* M'Mahon, 1847, 11 Ir. Eq. R. 287; Lalor *v.* Lalor, 1879, 4 L. R. Ir. 678.

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§§ 794, 795. exchange, made after he has negotiated it, cannot under any circumstances be received against the holder;[1] where a person had, by a voluntary post-nuptial settlement, conveyed away his interest in an estate, and afterwards executed a mortgage of the same property, his admission that money had actually been advanced upon the mortgage was held not to be admissible on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void;[2] and the declaration[3] of a bankrupt, though good evidence to charge his estate with a debt if made before his bankruptcy, is not admissible at all if it were made afterwards.[4] This most just and equitable doctrine will be found to apply to the cases of vendor and vendee, grantor and grantee, and, generally, to all cases of rights acquired in good faith previous to the time when the admission was made.[5]

§ 795. We have before briefly noticed,[6] that *confidential overtures of pacification*, and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded. This is on grounds of public policy.[7] If this were not so, it would often be difficult to take any steps towards an amicable compromise or adjustment. Lord Mansfield has observed that all men must be permitted to buy their peace, without prejudice to them should the offer not succeed; such offers being made to stop litigation, without regard to the question whether anything is due or not. If, therefore, a defendant, on being sued for 100*l*., should offer the plaintiff 20*l*., at the same time stating that he made such

[1] Pocock *v.* Billing, 1824, 2 Bing. 269; Shaw *v.* Broom, 1824, 4 Dowl. & R. 731. See Roberts *v.* Justice, 1843, 1 C. & K. 93.

[2] Doe *v.* Webber, 1834, 1 A. & E. 733; Gully *v.* Bp. of Exeter, 1828, 4 Bing. 298.

[3] Gr. Ev. § 180, in part.

[4] Bateman *v.* Bailey, 1794, 5 T. R. 512; Smith *v.* Simmes, 1795, 1 Esp. 330; Deady *v.* Harrison, 1815, 1 Stark. 60. See, also, Harwood *v.* Keys, 1832, 1 M. & Rob. 204; and Kempland *v.* Macaulay, 1791, Peake, R. 66.

[5] Welstead *v.* Levy, 1831, 1 M. & Rob. 139; Bartlett *v.* Delprat, 1808, 4 Mass. 702 (Am.); Clark *v.* Waite, 1815, 12 Mass. 439 (Am.); Bridge *v.* Eggleston, 1817, 14 Mass. 245 (Am.); Phenix *v.* Ingraham, 1809, 5 Johns. 412 (Am.); Placker *v.* Gonsalus, 1815, 1 Serg. & R. 526 (Am.); Patton *v.* Goldsborough, 1822, 9 Serg. & R. 47 (Am.); Babb *v.* Clemson, 1825, 12 Serg. & R. 328 (Am.); Crowder *v.* Hopkins, 1843, 10 Paige, 183 (Am.); Padgett *v.* Lawrence, 1843, 10 Paige, 180 (Am.).

[6] Ante, § 774.

[7] Cory *v.* Bretton, 1830, 4 C. & P. 462; Healey *v.* Thatcher, 1838, 8 C. & P. 388; Paddock *v.* Forrester, 1842, 3 Scott N. R. 734; Jardine *v.* Sheridan, 1846, 2 C. & Kir. 24; Whiffen *v.* Hardwright, 1848, 11 Beav. 111; Hoghton *v.* Hoghton, 1852, 21 L. J. Ch. 482; Jones *v.* Foxall, 1852, 21 L. J. Ch. 725.

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offer "without prejudice," evidence of the offer would not be admissible in evidence; for it is irrelevant to the issue; it neither admits nor ascertains any debt, and is no more than saying that he would give 20*l.* to be rid of the action.[1] An offer made "without prejudice" cannot be looked at even upon a question of costs.[2] Even the giving of a small sum in order to obtain the release of a right, cannot be considered as an acknowledgment that a right exists; it amounts only to this—"I give you so much for not seeking to disturb me."[3] Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession,[4] will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected;[5] though, in this case, if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received.[6] The American courts have held that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise.[7]

§ 796. In the absence of any express, or strongly implied, restriction as to confidence, an offer of compromise is clearly admissible as *some* evidence of liability.[8] The offer of a less sum than the amount demanded will not, in general, support a count on an account stated, since it may be a mere offer to purchase peace;[9]—nor, perhaps, will an offer by the drawer of a bill, who is threatened with legal proceedings upon it, to give another bill by way of settlement, obviate the necessity of proving at the trial

[1] B. N. P. 236, b.
[2] Walker *v.* Wiltshire, 1889, 23 Q. B. D. 335, (C. A.).
[3] Underwood *v.* Ld. Courtown, 1804, 2 Sch. & Lef. 67 (Ir.).
[4] Thomson *v.* Austen, 1823, 2 Dowl. & Ry. 361.
[5] Waldridge *v.* Kennison, 1794, 1 Esp. 144.
[6] Id.
[7] Mount *v.* Bogert, 1816, Anthon, 190 (Am.); Murray *v.* Coster, 1825, 4 Cowen, 635 (Am.); Fuller *v.* Hampton, 1824, 5 Conn. 416 (Am.); Sanborn *v.* Neilson, 1828, 4 New Hamps. 501 (Am.); Delogny *v.* Rentoul, 1812, 2 Mart. 175 (Am.).
[8] Wallace *v.* Small, 1830, M. & M. 446; Watts *v.* Lawson, 1830, M. & M. 447, *n.*; Nicholson *v.* Smith, 1822, 3 Stark. R. 129.
[9] Wayman *v.* Hilliard, 1830, 7 Bing. 101.

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§§ 796—798. that he had received due notice of dishonour.[1] Nevertheless, there are occasions when the fact of an offer having been made may be entitled to considerable weight,[2] as, for instance, if the drawer of a bill, whose signature is in issue, has proposed a settlement. On the other hand, in a case[3] where the defendant was sued for keeping mischievous dogs, which had killed three of the plaintiff's cattle, and it appeared that on being told of the injury done by his dogs he had offered to settle for it, the court held, that though this was a fact, which in strictness should have been submitted to the jury as evidence of the scienter,[4] it was entitled to little, if any, weight, "as it might have been made from motives of charity without any admission of liability at all." Admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual.[5]

§ 797. As to a man's purchasing peace, or endeavouring to do so, the words of Lord Ellenborough,—when Sir William Scott was sued for illegally excommunicating one Beaurain, whose animosity he had endeavoured to stifle by a gift—are worth recalling, "Let this action be a lesson for all men to stand boldly forward—to stand on their characters—and not, by compromising a present difficulty, to accumulate mputations on their honour."[6]

§ 798.[7] Admissions made under circumstances of *constraint*, cannot be received when obtained by *illegal* duress;[8] but are

[1] Cuming *v.* French, 1809, 2 Camp. 106, *n.* See post, § 806.

[2] Harding *v.* Jones, 1835, Tyr. & Gr. 135.

[3] Thomas *v.* Morgan, 1835, 2 C. M. & R. 496. See, however, Sayers *v.* Walsh, 1848, 12 Ir. L. R. 435.

[4] The absurd doctrine of "scienter," as applicable to mischievous dogs, no longer prevails in its entirety. In Ireland, "the owner of every dog is liable in damages for injury done to any *sheep* by his dog," whether such dog be mischievous or not: 25 & 26 V. c. 59 ("The Dogs (Ireland) Act, 1862"), § 1, Ir. See, also, 28 & 29 V. c. 50, Ir. A somewhat similar amendment of the law has been introduced into England and Scotland, and has been extended in these countries to injuries caused by dogs to *sheep or cattle*: 26 & 27 V. c. 100 ("The Dogs (Scotland) Act, 1863"), § 1, Sc.; 28 & 29 V. c. 60 ("The Dogs Act, 1865"). The word "cattle" here used includes horses: Wright *v.* Pearson, 1869, L. R. 4 Q. B. 582.

[5] Gregory *v.* Howard, 1800, 3 Esp. 113; Slack *v.* Buchannan, 1790, Peake, R. 5.

[6] Ld. Eldon's Life, by Twiss, vol. ii. pp. 233—235, 2nd edit.

[7] Gr. Ev. § 193, in part.

[8] Stockfleth *v.* De Tastet, 1814, 4 Camp. 11; Robson *v.* Alexander, 1828, 1 M. & P. 448. As to what questions a witness may refuse to answer, see post, §§ 1453 et seq.

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§§ 798, 799.

admissible, at least on the trial of civil actions,[1] if the compulsion under which they were made was legal. Thus affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken in bankruptcy, will be evidence against himself in a subsequent cause. They, under these circumstances, are admissible even though the subsequent opponent was a stranger to the prior proceedings,[2]—though the party who made the admission might, had he thought fit, have successfully demurred to the questions,[3]—or though the questions were irrelevant to the matter before the court at the time of the examination, and were put for the purpose of procuring evidence in another action depending against him,[4]—or though the witness had no opportunity of fully explaining the testimony he had given. For example, in an action[5] for taking the plaintiff's ship, the testimony given by the defendant as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him, though it appeared that when, in giving his evidence, he was proceeding to state his reasons for taking the ship, the judge had stopped him by saying that it was unnecessary for him to vindicate his conduct; and where a defendant had been examined in bankruptcy, and, though the whole of what he said had not been taken down, the portion that was reduced to writing had been read over and signed by him, such portion was held to be receivable against him as a statement of facts, the truth of which he had admitted.[6]

§ 799. An admission, obtained under a compulsory examination, may, it is submitted,[7] be evidence of an *account stated*. If,

[1] As to their admissibility in *criminal* proceedings, see post, §§ 883, 895—899.

[2] Grant *v.* Jackson, 1793, Peake, R. 203; Ashmore *v.* Hardy, 1836, 7 C. & P. 501.

[3] Smith *v.* Beadnell, 1807, 1 Camp. 30.

[4] Stockfleth *v.* De Tastet, 1814, 4 Camp. 10. If an examination has been perverted to improper purposes, the remedy is by an application to have the examination taken from the files and cancelled (Ld. Ellenborough).

[5] Collett *v.* Ld. Keith, 1803, 4 Esp. 212.

[6] Milward *v.* Forbes, 1803, 4 Esp. 171.

[7] The contrary has been supposed, but the case in which this point arose probably rests on the ground that the admission was there made to a third party (Tucker *v.* Barrow, 1828, 7 B. & C. 625), while to support an account stated the admission

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§§ 799—801.

for instance, an admission were contained in an answer to interrogatories, it would most probably be regarded as good evidence of an account stated.[1]

§ 800.[2] Passing now to a consideration of the *nature* of admissions, it may be observed that no difference exists, in regard to their admissibility, between direct admissions, and those which are *incidental*, or made in some other connection, or involved in the admission of some other fact. One or two illustrations of this have already been noticed while treating of admissions made by solicitors,[3] and the following may here be added. In an action by the assignees of a bankrupt against an auctioneer to recover the proceeds of a sale of the bankrupt's goods, the defendant's advertisement of the sale, describing the goods as "the property of D., a bankrupt," was held to be a conclusive admission that D. was a bankrupt, and that the defendant was acting under his assignees;[4] and a party who, with a view of making a trader a bankrupt, had made an affidavit that the trader owed him 100*l.*, and was become bankrupt, was not allowed to dispute the bankruptcy, when afterwards sued in trover by the assignees.[5]

§ 801.[6] Admissions are sometimes *implied from the assumption or the recognition of a character*. Whenever the existence of any domestic, social, or official relation is in issue, any recognition, whether by word or deed, of that relation, is *primâ facie* evidence of its existence, as against the person making such recognition.[7] Thus, where one has *assumed to act in an official character*, this is an admission by him of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office.[8] This doctrine has been applied, among other cases, in actions or prosecutions against clergymen,

must be made, either to the person to whom the money is owing, or to someone sent by him: Breckon *v.* Smith, 1834, 1 A. & E. 488; Bates *v.* Townley, 1848, 19 L. J. Ex. 399.

[1] See Bates *v.* Townley, 1848, 19 L. J. Ex. 399.

Gr. Ev. § 194, in part.

[3] Ante, § 773.

[4] Maltby *v.* Christie, 1795, 1 Esp. 340, as explained in Rankin *v.* Horner, 1812, 16 East, 193.

[5] Ledbetter *v.* Salt, 1828, 4 Bing. 623; Harmer *v.* Davis, 1817. See post, § 856, ad fin.

[6] Gr. Ev. § 195, in part.

[7] Dickinson *v.* Coward, 1818, 1 B. & Ald. 677; recognised in Inglis *v.* Spence, 1834, 4 L. J. Ex. 11.

[8] See ante, § 171.

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§§ 801, 802.

for non-residence;[1] against military officers, for returning false musters;[2] against popish priests, for remaining forty days within the kingdom, when this was considered an offence of no less magnitude than high treason;[3] against letter-carriers, for embezzlement;[4] and against solicitors,[5] toll-gatherers,[6] and collectors,[7] for penalties.

§ 802. Again, where a man has *recognised the official character of another*, by treating with him in such character or otherwise, this is at least primâ facie evidence of his title against the party thus recognising it.[8] For instance, where a person had obtained credit from the renter of turnpike tolls, and had afterwards accounted with him in that character, and made him a partial payment, he was not permitted to question the legality of his appointment;[9] where a farmer-general of post-horse duties brought an action for certain statute penalties against a person who let out horses for hire, proof of plaintiff's appointment was waived, the defendant having previously accounted with him as farmer-general;[10] the clerk of the trustees of a turnpike road has been prevented from showing that a person who had acted as a trustee, and whom he had himself, while clerk, treated as such, was not duly qualified;[11] in an action by the trustee of a bankrupt against a debtor, who has made him a partial payment,[12] or has acknowledged his title in letters to the solicitor under the bankruptcy,[13] the plaintiff need not prove his title as trustee, though notice to dispute it has been given; in an action by a solicitor for defamation, in charging him with swindling, and threatening to have him struck off the rolls, this threat was held to imply an admission that the plaintiff was a solicitor;[14] and in

[1] Bevan *v.* Williams, 1776, 3 T. R. 635, *n.*

[2] R. *v.* Gardner, 1810, 2 Camp. 513.

[3] R. *v.* Kerne, 1679, 7 How. St. Tr. 714; R. *v.* Bromwich, 1679, 7 How. St. Tr. 722; R. *v.* Atkins, 1679, 7 How. St. Tr. 728.

[4] R. *v.* Borrett, 1833, 6 C. & P. 124. The prisoner was indicted under 2 W. 4, c. 4, now repealed by 24 & 25 V. c. 95.

[5] Cross *v.* Kaye, 1796, 6 T. R. 633.

[6] Trowbridge *v.* Baker, 1823, 1 Cowen 251 (Am.).

[7] Lister *v.* Priestly, 1810, Wightw. 67.

[8] Peacock *v.* Harris, 1808, 10 East, 104.

[9] See ante, §§ 173—175.

[10] Radford *v.* M'Intosh, 1790, 3 T. R. 632.

[11] Pritchard *v.* Walker, 1827, 3 C. & P. 212.

[12] Dickinson *v.* Coward, 1818, 1 B. & Ald. 677.

[13] Inglis *v.* Spence, 1834, 4 L. J. Ex. 11; Crofton *v.* Poole, 1830, 1 B. & Ad. 568.

[14] Berryman *v.* Wise, 1791, 4 T. R. 366.

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§§ 802—804.

a similar action by a physician, where the plaintiff was spoken of as "Doctor L.," and the defendant had, as an apothecary, made up medicines prescribed by him, the Court of Common Pleas was equally divided upon the question, whether the defendant's words and conduct amounted to an acknowledgment of the plaintiff's character.[1] In actions of this kind, however, if the words complained of charge a *want* of qualification and not mere misconduct, the plaintiff must prove that he possesses the character which has been impugned.[2]

§ 803. Thus, in an action by a surgeon for work and labour, where[3] the defence was that the plaintiff was a physician, and therefore incapable, by the law then in force,[4] of maintaining an action for fees, it having been shown that the plaintiff had written prescriptions and signed himself M.D., Lord Ellenborough was on the point of nonsuiting him—saying that "if a person passes himself off as a physician, he must take the character cum onere" —when it appeared that the defendant had paid money into court; on this, his lordship thought that this act was tantamount to an admission of the plaintiff's right to sue as a surgeon, and got over the objection.

§ 804.[5] Admissions may (as has already been mentioned while treating of presumptions[6]) be implied from the *conduct* of the party. Thus, an attempt by a plaintiff to suborn false witnesses is cogent evidence that his cause is an unrighteous one;[7] the suppression of documents is an admission that the contents were deemed unfavourable to the party suppressing them;[8] the entry

[1] Smith *v.* Taylor, 1805, 1 Bos. & P. N. R. 196; Sir J. Mansfield and Heath, J., affd., Rooke and Chambre, JJ., neg.

Id.; Collins *v.* Carnegie, 1834, 1 A. & E. 695, 703.

[3] Lipscombe *v.* Holmes, 1810, 2 Camp. 441. See, further, on this subject, R. *v.* Barnes, 1816, 1 Stark. R. 243; Cummin *v.* Smith, 1816, 2 Serg. & R. 440 (Am.); Divoll *v.* Leadbetter, 1826, 4 Pick. 220 (Am.).

[4] See now 21 & 22 V. c. 90, § 31; Gibbon *v.* Budd, 1863, 32 L. J. Ex. 182; and bye-law of the Royal College of Physicians, that no *Fellow* of the College shall be entitled to sue for fees. This bye-law, it will be observed, does not extend to ordinary *members* of the College, and such persons may now sue by virtue of the Medical Act.

[5] Gr. Ev. § 196, in part.

[6] Ante, §§ 107, 116, 117, 178, 555.

[7] Moriarty *v.* Lond. Chat. & D. Rail. Co., 1870, L. R. 5 Q. B. 314.

[8] James *v.* Biou, and Owen *v.* Flack, 1826, 2 Sim. & St. 606; Bell *v.* Frankis, 1842, 11 L. J. C. P. 300; Curlewis *v.* Corfield, 1841, 1 G. & D. 489; Clifton *v.* U. S., 1846, 45 U. S. 242; R. *v.* Lond. Bright. & S. Coast Rail. Co., 1851, 20 L. J. M. C. 145; Sutton *v.* Devonport, 1857, 27 L. J. C. P. 54; Edmonds *v.* Foster, 1875, 45 L. J. C. P. 41.

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of a charge to a particular person in a tradesman's book, or the making out of a bill of parcels in his name, is an admission that the goods were furnished on his credit;[1] the delivery, by a tradesman, of an invoice or account in which goods are described as bought from him, is strong, but not conclusive, evidence that he was the real vendor;[2] the omission of a claim in a schedule of the debts due to the framer of it, which is given on oath, is an admission that such debt is not due;[3] and payment of money is an admission against the payer, that the receiver is the proper person to receive it,—although not against the receiver, that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume, without inquiry, that the party tendering the money was the person legally bound to pay it.[4]

§ 805. Admissions from conduct may also arise in settlement cases. Thus, relief given at various times to a pauper while he is residing in *another* parish, is cogent, though not conclusive, evidence that he is settled in the relieving parish.[5]

§ 806. Admissions by conduct also arise in actions connected with bills of exchange. Thus, a distinct promise by the drawer

[1] Storr *v.* Scott, 1833, 6 C. & P. 241. See Thomson *v.* Davenport, 1829, 9 B. & C. 78.

[2] Holding *v.* Elliott, 1850, 39 L. J. Ex. 134. See post, § 1153.

[3] In Nicholls *v.* Downes, 1830, 1 M. & Rob. 13, Lord Tenterden held it to be conclusive, apparently questioning Hart *v.* Newman, 1811, 3 Camp. 13, where Ld. Ellenborough treated it as entitled to little weight. See Tilghman *v.* Fisher, 1840, 9 Watts, 441 (Am.).

[4] James *v.* Biou, 1826, 2 Sim. & St. 606; Chapman *v.* Beard, 1797, 3 Anstr. 942.

[5] R. *v.* Barnsley, 1813, 1 M. & Selw. 377; R. *v.* Wakefield, 1804, 5 East, 335; R. *v.* Stanley cum Wrenthorpe, 1812, 15 East, 350; R. *v.* East Winch, 1840, 12 A. & E. 697; R. *v.* Yarwell, 1829, 9 B. & C. 894; R. *v.* Carnarvonshire JJ., 1841, 11 L. J. M. C. 3. Formerly the relief must have been given by the churchwardens and overseers in order to furnish evidence against the parish, but the board of guardians now represent for this purpose every parish within the union (see R. *v.* Croudall, 1847, 10 Q. B. 812); and the clerk to the guardians represents the board (R. *v.* Wigan, 1849, 19 L. J. M. C. 18). Even a single instance of such relief having been given will warrant a similar conclusion (R. *v.* Edwinstowe, 1828, 8 B & C. 671). Of course, the effect of such evidence will be much stronger if the examination states a distinct head of settlement in the relieving parish, though the technical proof may fail to establish it satisfactorily (R. *v.* Bedingham, 1844, 1 New Sess. Cas. 144). On the other hand, the relief of a pauper, while residing in *the relieving* parish, is no evidence whatever of a settlement, however frequently it may have been bestowed; R. *v.* Chatham, 1807, 8 East, 498; R. *v.* Trowbridge, 1827, 7 B. & C. 252; R. *v.* Coleorton, 1830, 1 B. & Ad. 25; R. *v.* St. Giles-in-the-Fields, 1844, 13 L. J. M. C. 89.

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§§ 806, 807.

to pay, or indeed any acknowledgment by him of liability upon, a dishonoured bill,—as, for example, the suffering judgment by default in a prior action, brought by a former holder of the instrument,—will raise an inference that he has either received or waived due notice of dishonour,[1] and, in the case of a foreign bill, that it has been duly protested ;[2] and a jury will be justified in coming to the same conclusion on less positive evidence; as, for instance, if the drawer, in disclaiming liability when threatened with an action, did not rest his defence on the want of notice, but on some different ground.[3] The maxim, expressum facit cessare tacitum, will here raise a presumption, which a defendant may find it difficult to rebut.

§ 807. Again: conduct may create a waiver of a determination of the relationship of landlord and tenant, which has previously been brought about by forfeiture, under the terms of the holding, or by notice to quit. Such determination is waived by the landlord's suing,[4] or distraining,[5] for rent accruing due since a forfeiture of which the lessor has had notice, as also by the acceptance of such rent,[6] and perhaps by even the mere demand of it,[7]—unless, indeed, an action to recover the property has actually been brought previously.[8] For these acts amount to an acknowledgment of the tenancy on the part of the lessor.[9] If,

[1] Rabey *v.* Gilbert, 1861, 30 L. J. Ex. 170; Woods *v.* Dean, 1862, 32 L. J. Q. B. 1; Cordery *v.* Colvin, 1863, 32 L. J. C. P. 210; Killby *v.* Rochussen, 1865, 18 C. B. N. S. 357.

[2] Hicks *v.* D. of Beaufort, 1838, 4 Bing. N. C. 229; Campbell *v.* Webster, 1845, 15 L. J. C. P. 4; Patterson *v.* Becher, 1821, 6 Moore, C. P. 319; Brownell *v.* Bonney, 1841, 1 Q. B. 39; Pardoe *v.* O'Connor, 1848, 12 Ir. L. R. 63. See Bell *v.* Frankis, 1842, 11 L. J. C. P. 300; Holmes *v.* Staines, 1850, 3 C. & Kir. 19.

[3] Wilkins *v.* Jadis, 1831, 2 B. & Ad. 188 (Ld. Tenterden); Curlewis *v.* Corfield, 1841, 1 Q. B. 814. See ante, § 796.

[4] Roe *v.* Minshal, 1759, cited Buller, N. P. 96; Dendy *v.* Nicholl, 1858, 27 L. J. C. P. 220. See Toleman *v.* Portbury, 1872, L. R. 5 Q. B. 288.

[5] Doe *v.* Peck, 1830, 1 B. & Ad. 428; Cotesworth *v.* Spokes, 1861, 30 L. J. C. P. 220; Ward *v.* Day, 1864, 7 Notes of Cases, Ecc. & Mar. 96, 101.

[6] Warwick *v.* Hooper, 1850, 2 Mac. & G. 60; Croft *v.* Lumley, 1857-8, 27 L. J. Q. B. 321 (H. L.); Price *v.* Worwood, 1859, 28 L. J. Ex. 329; Davenport *v.* The Queen, 1877, 3 App. Cas. 115 (P. C.). See Keen *v.* Biscoe, 1878, 8 Ch. D. 201.

[7] Doe *v.* Birch, 1836, 5 L. J. Ex. 185.

[8] Grimwood *v.* Moss, 1872, L. R. 7 C. P. 360; Serjeant *v.* Nash, Field & Co., 1903, 2 K. B. 304.

[9] Goodright *v.* Davids, 1778, 2 Cowp. 803; Walrond *v.* Hawkins, 1875, L. R. 10 C. P. 342; Roe *v.* Harrison, 1788, 2 T. R. 430; Doe *v.* Allen, 1810, 3 Taunt. 78; Doe *v.* Rees, 1838, 4 Bing. N. C. 384; Arnsby *v.* Woodward, 1827, 6 B. & C. 519. In Ireland, however, it has now for some years been provided by statute

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however, a breach be a continuing one, as the using rooms in a prohibited manner, or the omitting to keep premises insured or repaired, the acceptance of rent after such breach will not waive the forfeiture incurred by subsequent user or omission.[1] A notice to quit will also in general be regarded as waived, if the landlord *accepts* rent subsequently accruing due, or puts in a distress for *such* rent, or does any other act amounting to a recognition of an existing tenancy, after the expiration of the time when the tenant ought to have quitted according to the notice.[2] Whether a simple *demand* of rent subsequently accruing due, or the bringing of an action for such rent, will operate as a waiver of a notice to quit, is a question not of law, but of fact, which must consequently be determined by the jury.[3] When a valid notice to quit[4] has had the legal effect of determining a tenancy, the waiver of such notice does not revive the tenancy thus determined, but creates a new one.[5]

§ 808. To the instances above mentioned, in which the common law infers a waiver of the determination of a tenancy by conduct, must be added a case in which the Legislature[6] has provided a conclusive inference from particular conduct. For it has provided that if a lease granted unto a power be invalid by reason of some deviation from the terms of the power, the acceptance of rent under it shall be deemed a confirmation of the lease as against the person accepting the rent; provided such person, or some one else by his authority, shall, before or at the time of accepting

(23 & 24 V. c. 154, § 43) that where any lease, made after the 1st of January, 1861, shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant, no act done or suffered by the landlord shall be deemed a dispensation therewith, or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord, or his authorised agent, in writing under his hand.

[1] Doe *v.* Woodbridge, 1829, 9 B. & C. 376; Doe *v.* Peck, 1830, 1 B. & Ad. 428; Hyde *v.* Watts, 1843, 13 L. J. Ex. 41; Price *v.* Worwood, 1859, 28 L. J. Ex. 329; Doe *v.* Gladwin, 1845, 14 L. J. Q. B. 189; Doe *v.* Jones, 1850, 19 L. J. Ex. 405. See post, § 847.

[2] Zouch *v.* Willingale, 1790, 1 H. Bl. 312; Goodright *v.* Cordwent, 1795, 6 T. R. 219; Doe *v.* Batten, 1775, 1 Cowp. 243; Doe *v.* Calvert, 1810, 2 Camp. 388.

[3] Blyth *v.* Dennett, 1853, 22 L. J. C. P. 79; Doe *v.* Batten, 1775, 1 Cowp. 243; Vance *v.* Vance, 1871, Ir. R. 5 C. L. 363.

[4] See Holme *v.* Brunskill, 1877, 3 Q. B. D. 495 (C. A.); Ahearn *v.* Bellman, 1879, L. R. 4 Ex. D. 201 (C. A.).

[5] Tayleur *v.* Wildin, 1868, L. R. 3 Ex. 303.

[6] By 13 & 14 V. c. 17, § 2.

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§§ 808, 809. the rent, sign a receipt, memorandum, or note in writing confirming such lease.

§ 809.[1] Admissions may also be implied from the *acquiescence* of the party. Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party.[2] And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood, by the party, before any inference can be drawn from his passiveness or silence.[3] The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated.[4] Examples of acquiescence are as follows. As between landlord and tenant, a landlord quietly suffering a tenant to expend money in making alterations and improvements on the premises, is evidence of his consent to the alterations;[5] and if a tenant, on *personally* receiving notice to quit on a particular day, makes no objection, his conduct would amount to primâ facie evidence that his tenancy expires on the day stated in the notice,[6] but this will not be so if he is unable to read, or does not read the notice in the presence of the person effecting service.[7] For the purposes of the bankruptcy

[1] 1 Gr. Ev. § 197, in great part.

[2] Allen *v.* McKeen, 1833, 1 Sumn. 314 (Am.).

[3] See Smith *v.* Hayes, 1867, Ir. R. 1 C. L. 333; Davies *v.* Marshall, 1861, 31 L. J. C. P. 61; Bickett *v.* Morris, 1866, L. R. 1 H. L. 47.

[4] R. *v.* Mitchell, 1892, 17 Cox, C. C. 503; Melen *v.* Andrews, 1829, M. & M. 336; explained in Simpson *v.* Robinson, 1848, 18 L. J. Q. B. 73; R. *v.* Newman, 1852, 2 Den. 390; Boyd *v.* Bolton, 1844. 8 Ir. Eq. R. 113. See Bigg *v.* Strong, 1857, 3 Sm. & G. 592.

[5] Doe *v.* Allen, 1810, 3 Taunt. 78; Doe *v.* Pye, 1795, 1 Esp. 366; Neale *v.* Parkin. 1795, 1 Esp. 229. See, also, Stanley *v.* White, 1811, 14 East, 338; Cotching *v.* Basset, 1862, 32 L. J. Ch. 286. But merely lying by and passively witnessing a breach of covenant for several years is not such an acquiescence as to amount to a waiver of the forfeiture: Doe *v.* Allen, 1810, 3 Taunt. 78; Perry *v.* Davis, 1858, 3 C. B. N. S. 769; Macaulay *v.* Robertson, 1886, 18 L. R. Ir. 483. But see Keating *v.* Bolton, 1887, 22 L. R. Ir. 143, and also ante, § 808.

[6] Doe *v.* Biggs, 1809, 2 Taunt. 107; Thomas *v.* Thomas, 1811, 2 Camp. 647; Doe *v.* Forster, 1811, 13 East, 405; Oakapple *v.* Copous, 1791, 4 T. R. 361; Doe *v.* Wombwell, 1811, 2 Camp. 559. See Walker *v.* Godé, 1861, 30 L. J. Ex. 172.

[7] Doe *v.* Calvert, 1810, 2 Camp. 388, explained Thomas *v.* Thomas, 1811, 2 Camp. 647; Doe *v.* Forster, 1811, 13 East, 405. The Irish law is regulated, in part, by § 6 of 23 & 24 V. c. 154, which enacts that "every tenancy from year to year shall be presumed to have commenced on the last gale day of the calendar year on which rent has become due and payable in respect

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laws, a debtor who hears himself inquired for and denied, thereby furnishes some evidence against himself that he is beginning to keep house with intent to defeat or delay his creditors, and, consequently, is committing an act of bankruptcy.[1] In general, wherever one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation.[2] Thus it was held that an executor who, having been served with notice of motion to pay into court part of the testator's estate, which was sworn by affidavit to have reached his hands, had, by his silence, and by refraining from disputing the facts deposed to, made a sufficient admission of their truth to justify the making of the order.[3] And where two brothers, claiming derivative settlements from their father, having been removed by successive orders, and the examination of the father proving his settlement having been served upon the appellants together with the first order, against which there was no appeal, the fact of the appellants not objecting to the *ground of removal* when they received the first son, was held slight evidence of an admission that the father was settled in their parish.[4]

§ 810. There, moreover, may, as between debtor and creditor, also be admissions by conduct. Thus, raising an objection to one item of an account and making no remark as to the rest, may amount to evidence of an account stated as to those items to which no objection has been made;[5] and, *among merchants*, it has been held in certain old cases that an account rendered will be regarded as allowed, if it be not objected to within a second or third post,[6] or, at least, if it be kept for any length of time by the addressee without his making an objection it becomes a stated

of the premises, until it shall appear to the contrary"; and, in part, by § 58 of 33 & 34 V. c. 46.

[1] Key *v.* Shaw, 1832, 8 Bing. 320. See 46 & 47 V. c. 52, § 4, sub-sect. 1 (D).

[2] In Morris *v.* Burdett, 1808, 1 Camp. 218, a candidate not bound by statute to pay for the hustings erected for an election, had made use of them. In Abbot *v.* Hermon, 1830, 7 Greenl. 118 (Am.), a schoolhouse had been used by the school district: Hayden *v.* Madison, 1830, 7 Greenl. 76 (Am.).

[3] Freeman *v.* Cox, 1878, 8 Ch. D. 148; Hampden *v.* Wallis, 1884, 27 Ch. D. 251 (C. A.).

[4] R. *v.* Sow, 1843, 4 Q. B. 93.

[5] Chisman *v.* Count, 1841, 10 L. J. C. P. 124.

[6] Sherman *v.* Sherman, 1787, 2 Vern. 276.

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§§ 810, 811.

account.[1] It seems, however, to be doubtful how far these cases would be followed at the present day, and whether, apart from any special circumstances under which the account is sent in, any valid distinction can be drawn between accounts rendered between merchants and those between other persons; with regard to these latter it appears now to be clear that the mere fact that they have been kept by the addressee without remark is no evidence that he has acquiesced in their contents.[2] But what a party *says* when an account is delivered to him by hand, or upon a statement made in his presence, may be given in evidence against him along with the account or statement, because what is thus offered is the act or declaration of the party to be affected by it, and the account or the statement is by reference made a part of such act or declaration; though here, again, the naked fact that an account remains in the possession of a party to whom it was sent, does not amount to an acquiescence in its contents.[3]

§ 811. Lord Tenterden remarked[4] that "what is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events admits the truth of the statements that letter contains." There is in general no duty cast upon the recipient of a letter to answer it, and his omission to do so does not amount to any admission of the truth of the statements contained in it. It may, however, be otherwise where the relation between the parties is such that a reply might properly be expected,[5] as where one man of business states in a letter to another that the latter has agreed to do certain things, the person who receives the letter must answer it if he means to dispute the fact that he did so agree; or where merchants are in dispute one with the other, in the course of carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that," if the other does not answer the letter,

[1] Willis *v.* Jernegan, 1741, 2 Atk. 252; Tickel *v.* Short, 1750, 2 Ves. sen. 239, where the account had been kept without objection for two years.

[2] Irvine *v.* Young, 1824, 1 S. & S. 333; Price *v.* Ramsay, 1840, 2 Jebb. & Sy. 338.

[3] Price *v.* Ramsay, 1840, 2 Jebb. Sy. 342, 343 (Ir.) (Bushe, C.J.).

[4] In Fairlie *v.* Denton, 1828, 3 C. & P. 103.

[5] Per Willes, J., in Richards *v.* Gellatly, 1872, L. R. 7 C. P. 127 at p. 131.

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§§ 811, 812.

but proceeds with the negotiations, he must be taken to admit the truth of the statement.[1] Lord Denman once declared, that "it was a great deal too broad a proposition to say, that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it."[2]

§ 812. An admission by conduct may, too, be made by being found in possession of letters and other papers, as it is a primâ facie inference that the person in whose possession they are found knows their contents and has acted upon them.[3] Such evidence is occasionally available in a civil suit.[3] It is frequently received in criminal prosecutions, especially those for conspiracy and treason, though its weight, as evidence against the prisoner, will in a great measure depend on the fact, whether answers to the letters or papers can be traced, or whether anything can be shown to have been done upon them.[4] The mere[5] opportunity of constant access to documents may, indeed, sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents.[6] Thus, the rules of a club, or a record of the proceedings of a society, contained in a book kept by the proper officer and accessible to the members,[7]—charges against a club, entered by the servants of the house in a book kept for that purpose open in club-room,[8] and the like,—are admissible against the members;

[1] Per Esher, M.R., in Wiedeman *v.* Walpole, 1891, 2 Q. B. 534. In Gaskill *v.* Skeene, 1857, 19 L. J. Q. B. 275, the Queen's Bench held, that letters containing a demand, written to a defendant, and unanswered by him, were admissible in evidence for the plaintiff, though they also stated facts showing how the demand arose; but possibly that case rested on the ground, that the defendant had made some unsatisfactory statements respecting these letters, in a subsequent conversation with the plaintiff's agent. On this last ground, unanswered letters written to a party have been admitted as evidence in America: Dutton *v.* Woodman, 1852, 9 Cush. 262 (Am.). See, also, Keen *v.* Priest, 1858, 1 F. & F. 314; Lucy *v.* Mouflet, 1860, 29 L. J. Ex. 110; Carne *v.* Steer, 1860, 29 L. J. Ex. 281; and Gore *v.* Hawsey, 1862, 3 F. & F. 509.

[2] In Doe *v.* Frankis, 1840, 11 A. & E. 795.

[3] Hewitt *v.* Piggott, 1831, 5 C. & P. 75.

[4] R. *v.* Horne Tooke, 1794, 25 How. St. Tr. 120; R. *v.* Watson, 1817, 2 Stark. R. 139.

[5] Gr. Ev. § 198, in part.

[6] See, however, Hallmark's case, 1878, 9 Ch. D. 329 (C. A.); disapproving of Wheatcroft's case, 1873, 42 L. J. Ch. 853; and Ex parte Brown, 1854, 19 Beav. 97.

[7] Raggett *v.* Musgrave, 1827, 2 C. & P. 556; Alderson *v.* Clay, 1816, 1 Stark. R. 405; Ashpitel *v.* Sercombe, 1850, 19 L. J. Ex. 44.

[8] Wiltzie *v.* Adamson, 1789, 1 Ph. Ev. 357.

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§§ 812—814. their knowledge of the contents of the books, and their acquiescence therein, being presumable under the circumstances. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer, or co-partners, will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities from time to time for testing the accuracy of the entries.[1]

§ 813.[2] Admissions are too, sometimes, inferred from *acquiescence in the oral statements of others*. "Nothing," it has been observed, "can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction—some assertions made to the party with respect to his right, which by his silence he acquiesces in."[3] A *distinction* has accordingly been taken *between declarations* made by a *party interested* and those made *by a stranger*; and while what one party declares to the other without contradiction is admissible evidence, what is said to a party by a third person may well be inadmissible. It may be impertinent, and be best rebuked by silence.[4] Still less will statements made by strangers in the presence of a party be receivable against him, if they be *not directly addressed* to him; because, in such case, he can scarcely under any circumstances be called upon to interfere.[5]

§ 814. Moreover, to affect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been accepted by him either in words or by his conduct. The statements only become evidence when by such acceptance he makes them his own statements.[6] Depositions, therefore, taken

[1] Symonds *v.* Gas Light and Coke Co., 1848, 11 Beav. 283; Boardman *v.* Jackson, 1813, 2 Ball. & B. 382 (Ir.); Kilbee *v.* Sneyd, 1828, 2 Moll. 193 (Ir.); Lodge *v.* Prichard, 1853, 3 De G. M. & G. 906; R. S. C. 1883, Ord. XXXIII. r. 3.

[2] Gr. Ev. § 199, in great part.

[3] Moore *v.* Smith, 1826, 14 Serg. & R. 393 (Am.).

[4] Child *v.* Grace, 1825, 2 C. & P. 193.

[5] Moore *v.* Smith, 1826, 14 Serg. & R. 393 (Am.).

[6] R. *v.* Smith, 1897, 18 Cox, C. C. 470 (Hawkins, J.); and see Boyd *v.* Bolton, 1844, 8 Ir. Eq. R. 113.

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§§ 814—816.

in the presence of a party during a judicial investigation, observations made by a magistrate to the parties before him, and confessions of an accomplice criminating his co-prisoner before the justices, will not, in general, be evidence in any subsequent trial, whether civil or criminal, against the party who heard them in silence; because in judicial inquiries a strictness of proceeding is adopted, which often prevents a person from interfering when and how he pleases, as he naturally would do in a common conversation.[1] The same inferences cannot, therefore, be drawn from his silence or his conduct on such occasions as might result from similar behaviour, were he under no restraint; and as it is only by the prisoner's acceptance of them that the statements of other parties can ever be admitted, they are properly rejected whenever they do not warrant such an inference. A similar distinction has been recognised in the civil law, by which "confessio facta seu præsumpta ex taciturnitate in aliquo judicio, non nocebit in alio."[2]

§ 815. If, however, the statement of one person calls forth a *reply* from another, so much of the statement as the reply admits the truth of becomes evidence against the party replying. If a prisoner denies the statement in his reply it cannot be put in evidence, for to allow such a statement to be put in evidence in the face of the prisoner's denial could not fail to be most unfairly prejudicial to him, for when once read as such evidence it would be extremely difficult, if not impossible, to prevent it making an impression hostile to him.[3]

§ 816.[4] But the *silence* of the party, even where declarations are addressed to himself, at a time, too, when he is at full liberty to reply as he thinks fit, is, at best, worth very little as evidence of acquiescence;[5] and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny

[1] Melen *v.* Andrews, 1829, M. & M. 336; Short *v.* Stoy, 1836, cited in Roscoe, Ev. 54, 55, as ruled by Alderson, B.; R. *v.* Appleby, 1821, 3 Stark. R. 33; R. *v.* Turner, 1832, 1 Moo. C. C. 347; Child *v.* Grace, 1825, 2 C. & P. 193.

[2] 1 Masc. de Prob. concl. 348, n. 31.

[3] R. *v.* Smith, 1897, 18 Cox, 470 (Hawkins, J.). This judgment should be carefully studied by all who would understand the law on this point upon which there was at one time considerable doubt. See also post, § 907.

[4] Gr. Ev. § 199, in part.

[5] See Ch. 26 of St. Matthew, v. 59—63; and Ch. 27, v. 12—14.

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§§ 816—818.

it is almost valueless.[1] In all these cases it must be distinctly remembered, that the statement made in the party's presence or hearing[2] is not evidence against him, but his own conduct in consequence of such statement is the sole evidence. Magistrates often make mistakes on this subject: but it is highly important that the distinction should be observed.[3]

§ 817.[4] The *effect* of admissions, when proved, must next be considered. With regard to the extent to which a person is estopped from denying that which he has once admitted the policy of the law favours the investigation of truth by all expedient methods; the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded.[5] It is also to be observed, that estoppels bind only parties and privies; and not strangers. Hence a sheriff, who, in favour of a creditor, seizes goods as the property of the debtor, is not bound by an estoppel which would have prevented the debtor himself from claiming the goods.[6] Neither are the creditors or the trustee of a bankrupt bound by the bankrupt's admission, because the court regards them as claiming adversely to the bankrupt.[7] Again, though a stranger may often rely on an admission, which parties or privies might set up as an estoppel, yet, in his case, it is only matter of evidence to be considered by the jury.

§ 818. In an action[8] in which an alleged bankrupt sought to dispute his bankruptcy, the defendants contended that the plaintiff was estopped from bringing this action, as (in addition to other evidence of his acquiescence in their title) he had given notice to

[1] Hayslep *v.* Gymer, 1834, 1 A. & E. 165 (Parke, J.). See, further, on the subject of tacit admissions, The State *v.* Rawls, 1820, 2 Nott. & M'C. 301 (Am.); Batturs *v.* Sellers, 1820, 5 Har. & J. 117 (Am.).

[2] See Neile *v.* Jakle, 1849, 2 C. & K. 709.

[3] Per Alderson, B., at Maidstone Sp. Ass. 1842, MS.; Doe *v.* Frankis, 1840, 11 A. & E. 792.

[4] Gr. Ev. § 204, in part.

[5] See ante, § 89.

[6] Richards *v.* Johnston, 1859, 28 L. J. Ex. 322.

[7] Harris *v.* Rickett, 1859, 28 L. J. Ex. 47; Ex parte Revell. In re Tollemache, No. 1, 1884, 13 Q. B. D. 720.

[8] Heane *v.* Rogers, 1829, 9 B. & C. 577. See Morgan *v.* Couchman, 1853, 23 L. J. C. P. 36; Painter *v.* Abel, 1862, 3 F. & F. 518; Welland Canal Co. *v.* Hathaway, 1832, 8 Wend. 483 (Am.); Jennings *v.* Whittaker, 1826, 4 Monroe, 50 (Am.). See, also, Ld. Londesborough's case, 1853, 4 De G. M. & G. 411; and Ld. Londesborough *v.* Foster, 1863, 3 B. & S. 805.

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the lessors of a farm which he held that he had become bankrupt, and was willing to give up the lease, whereupon the lessors had accepted such lease, and taken possession of the premises. Upon the question whether the plaintiff was precluded by this surrender from disputing the commission in the present suit, Bayley, J., said: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him: but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies, not strangers.[1] The offer of surrender made in this case was to a *stranger to this suit:* and though the bankrupt may have been bound by his representation that he was a bankrupt, and his acting as such, as between him and the stranger to whom that representation was made, and who acted upon it, he is not bound as between him and the defendants, who did not act on the faith of that representation at all."

§ 819. The doctrine propounded in the above judgment, that a party is always at liberty to prove that his admissions were founded on *mistake*, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of fact.[2] In all cases of this nature, the jury, with the view of estimating the effect due to an admission, will be justified in considering the circumstances under which it was made; and if it should appear to have been made under an erroneous notion of legal liability, they may qualify its effect accordingly.[3]

§ 820. But while admissions are, as a rule, not *conclusive*, and may be shown to have been made under a mistake, certain

[1] Co. Lit. 352 a.; Com. Dig. Estop. C.

[2] Newton *v.* Liddiard, 1848, 18 L. J. Q. B. 53.

[3] Newton *v.* Belcher, 1848, 1 Q. B. 921; and Newton *v.* Liddiard, 1848, 18 L. J. Q. B. 53.

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§§ 820, 821. admissions undoubtedly are conclusive. First amongst these are *estoppels*, which have been considered in a former part of this work: we have there treated of estoppels by deed, alluded to those by record, and discussed that particular class of estoppels in pais, which relates to the rights of landlord and tenant.[1] In the present chapter it has already been shown that admissions solemnly made in the course of judicial proceedings, whether as a substitute for regular proof, or in a case stated for the opinion of the court, are on motives of policy and justice, deemed to be conclusive.[2] It only remains to examine the law as it regards other *conclusive admissions*; and these will, in general, be found to range themselves under one or other of the following heads. First, admissions expressly or tacitly made by *pleadings*; secondly, admissions which have been *acted upon* by others. To these may be added a few cases of fraud and illegality, and some admissions on oath, where the party is estopped on grounds of public policy.

§ 821. With respect to *admissions by pleading*, the law at present seems to be that statements which are contained in any pleading, though binding on the party making them for all purposes in the cause, ought not to be regarded in any subsequent action as admissions.[3] It was at one time, indeed, thought that a party might, by bringing an action on a contract, estop himself from denying the obligatory force of it as an agreement in a subsequent action against himself. Accordingly, Tindal, C.J.,[4] once expressed a strong opinion that if a corporation were to make an executory contract invalid against themselves for not being under seal, and then to sue thereon, this would amount to an admission on record that such contract was duly entered into on their part, so as to be obligatory on them; and would estop them, in answer to a counterclaim in the same action, or to another action by the defendants in a *cross action*, from setting up that it was not sealed by their common seal. But the doctrine as a whole on which this expression is founded, although unquestionably based on substantial justice, has hitherto met with little favour.[5]

[1] Ante, §§ 89—103.
[2] Ante, §§ 772, 783.
[3] Cases cited in note [5]; Neeson *v.* Waters, 1890, 63 L. T. 328.
[4] Fishmongers' Co. *v.* Robertson, 1843, 1 C. B. 67.
[5] See Copper Miners' Co. *v.* Fox, 1851, 20 L. J. Q. B. 174; Boileau *v.*

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§ 822. It is clear that an admission, *incidentally* or *tacitly* made in pleading in one suit, will not, as rule, estop the party who has made it from denying in another suit, where *precisely the same matter is not litigated*, the fact so admitted. For instance, where a plea to an action on a bond set out a corrupt agreement between the parties irrespective of the bond, and went on to aver that the bond was given to secure, among other moneys, the sum mentioned, in the *said* agreement; and the replication, tacitly admitting the corrupt agreement, traversed the fact of the bond having been given in consideration thereof, but the plaintiff failed on this issue; the admission was held available for the purpose of that suit only; and the plaintiff was consequently allowed to dispute the corrupt nature of the agreement, in a subsequent action on a collateral security.[1]

§ 823. An exception to the rule last stated arises, however, where the second action is brought on a judgment recovered in the first. For example, an executor or administrator who confesses judgment, or suffers it to go against him by default, thereby admits assets in his hands, and is estopped to say the contrary in an action on such judgment, suggesting a devastavit.[2] In order to charge the executor or administrator, indeed, even in such a case, *some* proof must be given that the assets have been wasted; but the slightest evidence will suffice for this purpose; and the mere issuing of a writ of fieri facias, directed to the county where the action was laid, and a return of nulla bona thereto, has, for a long time past, been deemed evidence enough.[3] In accordance with these principles, where, in an action against three executors two had pleaded plene administraverunt, and the third admitted assets to the amount of 383*l.*, in a subsequent action against the third executor, suggesting a devastavit the plaintiff was held entitled to recover; defendant's admissions in the former action being an admission of assets to the amount of 383*l.*, and the fact that she had given a cheque for that amount (which had been in

Rutlin, 1848, 2 Ex. 678; Buckmaster *v.* Meiklejohn, 1853, 22 L. J. Ex. 242; The May. of Kidderminster *v.* Hardwicke, 1873, 43 L. J. Ex. 9.

[1] Carter *v.* James, 1844, 13 L. J. Ex. 373. See Rigge *v.* Burbidge, 1846, 15 L. J. Ex. 309; and Hutt *v.* Morrell, 1849, 3 Ex. 241 (Pollock, C.B.).

[2] Skelton *v.* Hawling, 1749, 1 Wils. 258; Re Trustee Relief Act, Higgins' Trusts, 1861, 30 L. J. Ch. 405.

[3] Leonard *v.* Simpson, 1835, 2 Bing. N. C. 176.

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§§ 823—825.

fact dishonoured), being primâ facie evidence of a *devastavit* to that amount.[1]

§ 824. Questions with respect to admissions in pleading, chiefly, however, arise with regard to their effect in the *same suit.* In Admiralty, for instance, where a statement of claim in a salvage action is admitted, no evidence at all is in general receivable (unless special leave for its reception be given) in support of the plaintiff's case, which the statement of claim is required to state completely.[2] And both in the Queen's Bench and Chancery Divisions the broad rule is that "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be *taken to be admitted*, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."[3] The proper understanding of this rule is the province of the pleader:[4] and a detailed explanation of its effects must be sought in works on pleading. The rule, however, operates only with respect to *material* allegations. If, therefore, a statement of defence denies a particular fact alleged in the statement of claim, it does not thereby admit all the immaterial averments, which the pleader has chosen to introduce as part of the plaintiff's case.[5]

§ 825. Accordingly, where a plaintiff's claim—after stating that the defendants were *owners* of a vessel, on which the plaintiff caused to be shipped some potatoes to be carried by them, as *owners* of the vessel, to Liverpool: and that in consideration thereof, and of freight, they promised to carry the potatoes safely *as aforesaid*—alleged as a breach, that through their negligence the goods were damaged; it was held, that a defence of the general issue in answer to such claim did not by implication admit that the defendants were owners so as to raise the inference that the captain was their agent, since the allegation of ownership

[1] Coopee *v.* Taylor, 1844, 13 L. J. C. P. 92.

[2] The Hardwicke, 1883, 9 P. D. 32.

[3] R. S. C. 1883, Ord. XIX. r. 13. Now, however, no reply is to be delivered except by order and all material statements of fact in the previous pleading are deemed to have been denied. Post, § 829.

[4] Van Sandau *v.* Turner, 1845, 14 L. J. Q. B. 154.

[5] See Bingham *v.* Stanley, 1841, 2 Q. B. 117; Bennion *v.* Davison, 1838, 7 L. J. Ex. 116; Dunford *v.* Trattles, 1844, 13 L. J. Ex. 124; King *v.* Norman, 1847, 17 L. J. C. P. 23.

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was immaterial. The claim would have been equally good had no such allegation been made.[1]

§ 826. But the omission to traverse a *material* allegation, so far conclusively admits it, that the *party who thus pleads over cannot disprove it.* Therefore, where in trover for goods, defendant pleaded that A. was factor of the plaintiffs, and as such, before and *at the time* of the pledge mentioned in the plea, was *intrusted by them with*, and *was in possession of*, dock-warrants relating to the goods; that he delivered the dock-warrants to the defendant, and pledged with him the goods, as security for a loan which the defendant then advanced to him on the faith of the said dock-warrants; and that the defendant had no notice that the factor was not the actual owner; the plaintiffs were held to be debarred from proving that the dock-warrants had not been deposited at the time of the advance; and were in fact, not then in existence, where they had simply traversed the allegation that the defendant advanced the money on faith of the dock-warrants.[2]

§ 827. Under R. S. C., 1883, Ord. XXXII., r. 6, "any party may, at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as, upon such *admissions*, he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order or give such judgment, as the court or judge may think fit." Under this rule, in a partition action, where the defendants have, by their statement of defence, admitted the facts stated in the claim showing the plaintiff's title, the plaintiff has a right,—instead of having the action set down for hearing,—to an order on motion, directing the usual inquiries as to the persons interested in the property;[3] in an action between partners,[4] and in one between principal and agent,[5] an order for an account and

[1] Bennion *v.* Davison, 1838, 7 L. J. Ex. 116; recognised in Dunford *v.* Trattles, 1844, 13 L. J. Ex. 124. See, also, Grew *v.* Hill, 1849, 18 L. J. Ex. 317.

[2] Bonzi *v.* Stewart, 1842, 4 M. & Gr. 295. See, also, Carter *v.* James, 1844, 13 L. J. Ex. 373.

[3] Gilbert *v.* Smith, 1876, 2 Ch. D. 686 (C. A.); Hetherington *v.* Longrigg, 1879, 10 Ch. D. 162.

[4] Turquand *v.* Wilson, 1875, 1 Ch. D. 85.

[5] Rumsey *v.* Reade, 1876, 1 Ch. D. 643.

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§§ 827—829. for the delivery of securities has been made on motion before the hearing, the judge acting solely on the admissions contained in the pleadings;[1] so too, in an action for infringements of a patent where certain infringements have been admitted and others denied, the plaintiff is entitled to an order for an injunction and enquiry as to damages, which enquiry, however, will be limited to the infringements actually admitted, for a party moving for judgment upon admissions contained in a pleading must accept as accurate all the allegations contained in it.[2] A plaintiff may move for judgment upon admissions, although he has joined issue on the defence, and given notice of trial.[3] But in cases under the rule, as the judge has a discretion whether he will grant relief on motion or not, he will seldom take that step when any question of difficulty is raised; neither will the Court of Appeal, except in a clear case of error, interfere with the judge's exercise of his discretion.[4]

§ 828. Under the old rules of pleading, a demurrer was regarded by Courts of Equity as simply raising the question of law without any admission of the truth of the allegations in the bill; but in Courts of Law it was held to amount to an absolute admission of the facts stated in the paragraphs demurred to.[5] The RR. S. C. of 1883 have abolished demurrers altogether by Ord. XXV., r. 2, and substituted certain other proceedings.[6]

§ 829. It was further provided, by R. S. C., 1883, Ord. XXVII., r. 13, that "if the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be *deemed to have been denied* and put in issue."[7] And now by Ord. XXIII.,

[1] See, also, Jenkins *v.* Davies, 1876, 1 Ch. D. 696; In re Smith's Estate, Bridson *v.* Smith, 1876, 24 W. R. 392; In re Barker's Estate, 1878, 10 Ch. D. 162.

[2] United Telephone Co. *v.* Donohoe, 1886, 31 Ch. D. 399.

[3] Brown *v.* Pearson, 1882, 21 Ch. D. 706.

[4] Mellor *v.* Sidebottom, 1877, 5 Ch. D. 342.

[5] See Metrop. Rail. Co. *v.* Defries, 1877, 2 Q. B. D. 189, 387; and Rules of 1875, Ord. XXVIII.

[6] See, also, rr. 3, 4, and 5 of same Order. See Burstall *v.* Beyfus, 1884, 26 Ch. D. 35 (C. A.).

[7] See, also, R. S. C. Ord. XIX. r. 13, cited ante, § 824.

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r. 1, it is provided that "except in Admiralty actions no reply shall be delivered unless the same be ordered."

§ 830. Marriages which took place between 30th July, 1874, and 1st January, 1883, are governed by the Married Women's Property Act, 1874,[1] which enacted, with respect to such marriages, that husbands and wives should be jointly sued for debts incurred or torts committed by the wife before marriage, but that the husband should be liable to the extent only of the assets therein specified,[2] provided that, if no plea denying liability be pleaded, "the husband shall be deemed to have confessed his liability so far as assets are concerned."[3]

§ 831. Next, as to the effect by way of admission of *paying money into court*,[4] and of *tendering compensation*. Payment of money into court may be made, as of course, in *any*[5] action which is brought to recover a debt or damages.[6] Amends may also be paid into court in some special actions under the provisions of particular statutes. For instance, in an action for a libel contained in any newspaper or other periodical publication, whether in England or Ireland, the defendant may plead that the language complained of was inserted without actual malice, and without gross negligence, and that at the earliest opportunity he had published, or, in some cases, had offered to publish, an ample apology, and that a certain sum of money has been paid into court by way of amends.[7] Many other statutes

[1] 37 & 38 V. c. 50.

[2] §§ 1, 2, and 5.

[3] § 2. See Matthews *v.* Whittle, 1880, 13 Ch. D. 811. The Married Women's Property Act, 1874, was repealed by 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 14, 15 of which regulate the respective liabilities of husbands and wives married since 1st January, 1883.

[4] It must—except, possibly, in one or two other cases (as to which see ante, § 315, ad fin.)—be made before delivering a defence, and must in any case be pleaded, though it may be so pleaded to the whole or any part of the plaintiff's claim. See R. S. C. 1883, Ord. XXII. r. 4.

[5] See Hawksley *v.* Bradshaw, 1880, 5 Q. B. D. 302 (C. A.), from which it will be seen that there are one or two exceptions.

[6] R. S. C. 1883, Ord. XXII. r. 1. See, further, id. rr. 2, 4, and 5. R. 7, by imposing upon the plaintiff the duty of giving the defendant a special notice, exposes him to the risk of losing his costs in the event of his neglecting to comply with that rule. See Langridge *v.* Campbell, 1877, 2 Ex. D. 281, as explained by Buckton *v.* Higgs, 1879, 4 Ex. D. 174. See, also, Greaves *v.* Fleming, 1879, 4 Q. B. D. 226.

[7] See 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 2, as amended by 42 & 43 V. c. 59; and 8 & 9 V. c. 75 ("The Libel Act, 1845"), § 2, as to England; and 8 & 9 V. c. 75, § 2, as to Ireland. In the absence of the allegation of payment into Court,

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§§ 831–839. also authorise the tender of amends and pleas of payment of money into court.[1]

§§ 832-7. In these and other cases a payment into court, when unaccompanied by any defence denying liability, is "taken to admit the claim or cause of action in respect of which the payment is made." Defendant may now in any cause, except in actions or counterclaims for libel or slander, plead payment of money into court together with any other pleas, either denying the plaintiff's right of action, or setting up some special defence.[2]

§ 838.[3] When judicial admissions,—by which are meant admissions entered into in the due course of legal proceedings,—have been *made through inadvertence or mistake*, the court, in its discretion, will in some manner relieve the party from the consequences of his error.[4] Even agreements made out of court between solicitors, concerning the course of proceedings in court, are, in effect, equally under the court's control, by means of its coercive power over the solicitor in all matters relating to professional character and conduct. But, in all these cases, the party will be held to his admission, unless it *clearly* appear that he has acted through mistake.[5]

§ 839.[6] It is a broad rule of law that every admission, which

plaintiff may treat the plea as a nullity. The plaintiff is absolutely entitled to money paid into court under this Act, whatever damages he recover: Dunn *v.* Devon, &c. Newspaper Co., 1894, 63 L. J. Q. B. 342; but money paid into court under Ord. XXII. r. 5 is subject to the jurisdiction of the court: Gray *v.* Bartholomew, 1894, 64 L. J. Q. B. 125 (C. A.).

[1] These generally apply to actions brought against persons for acts done by them, either in execution of their offices, or in pursuance or under the authority of Acts of Parliament (see ante, §§ 311—315); and among these may be mentioned, "The Public Authorities Protection Act, 1893" (56 & 57 V. c. 61), § 1 (c), set out ante, § 73A, "The Seamen's Clothing Act, 1869" (32 & 33 V. c. 57, § 6), "The Army Act, 1881" (44 & 45 V. c. 58, § 170, sub-sect. 2), and "The Militia Act, 1882" (45 & 46 V. c. 49, § 46, sub-sect. 3).

[2] R. S. C. 1883, Ord. XXII. r. 1, cited ante, § 831, n. [8], expressly repeals the doctrine allowing such a defence in libel or slander previously established by Hawkesley *v.* Bradshaw 1880, 5 Q. B. D. 302 (C. A.). See, also, Berdan *v.* Greenwood, 1878, 20 Ch. D. 767, n. (C. A.).

[3] Gr. Ev. § 206, nearly verbatim.

[4] Dig. lib. 42, tit. 2, l. 2.

[5] See Pearse *v.* Grove, 1747, 3 Atk. 523. The Roman law was administered in the same spirit. "Si is, cum quo Lege Aquilia agitur, confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur": Dig. lib. 42, tit. 2, l. 4; id. l. 6. See, also, Van Leeuw. Comm., B. V. ch. 21; Everh. Conc. 155, n. 3. "Confessus pro judicato est": Dig. lib. 42, tit. 2, l. 1.

[6] Gr. Ev. § 207, in part.

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§§ 839, 840.

has been made with the intention of being acted upon, and which has been *acted upon by another person*, is conclusive against the party making it, in all cases between him and the individual whose conduct he has thus influenced; and this, whether such admission be made in express language to the person who acts upon it, or be implied from the general conduct of the party making it. In the latter case, the implied declaration will be considered as having been addressed to every one in particular, who may have had occasion to act upon it: and the rule of law is clear, that, where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.[1] Indeed, the principle may be laid down still more broadly, as precluding any party, who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, from disputing that fact in an action against the person whom he has himself assisted in deceiving.[2] In such case the party is estopped, on the grounds of public policy and good faith, from repudiating his own representations.[3]

§ 840. The meaning of the word "wilful," as used above, has been the subject of divergent judicial remarks.[4]

[1] Pickard *v.* Sears, 1837, 6 A. & E. at p. 474, recognised in Att.-Gen. *v.* Stephens, 1855, 25 L. J. Ch. 888.

[2] Per Ld. Denman, in Gregg *v.* Wells, 1839, 10 A. & E. 98; recognised by Parke, B., in Harrison *v.* Wright, 1845, 14 L. J. Ex. 196.

[3] See ante, §§ 89 et seq.

[4] In Freeman *v.* Cooke, 1848, 18 L. J. Ex. 114, Ld. Wensleydale observed: "By the term 'wilfully,' we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth [the rule, as here enunciated, was expressly adopted by the Court of Exchequer in Cornish *v.* Abington, 1859, 28 L. J. Ex. 262. See, too, Sweeney *v.* Promoter Life Ass. Co., 1863, 14 Ir. C. L. R. 476; Thomas *v.* Brown, 1876, 1 Q. B. D. 714; and M'Kenzie *v.* British Linen Co., 1881, 6 App. Cas. 82 (H. L.)]; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect;—as, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith

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§ 841. § 841. Another instance of a conclusive admission arises where a party, having a secret equity, chooses to stand by, and permit the apparent owner to deal with others as if he were the absolute owner, in which case he will not be permitted to assert such secret equity against a title founded on such apparent ownership.[1] For example, where[2] a landowner had signed, and put into the hands of his agent, an authority to consent to any exchanges under an Inclosure Act, and had directed him not to act upon this authority excepting under certain circumstances; but the agent, in breach of his private instructions, had produced the authority and agreed to an exchange not under the stipulated circumstances, the landowner was held to be bound by the agreement made under these circumstances. The courts have also acted upon this doctrine on several occasions, where negotiations have been entered into preparatory to marriage. The abstract rule deducible from the authorities on the whole is, that, whenever a representation[3] of some *fact*,—as contradistinguished from a mere representation of *intention*,[4]—has been made by one party for the purpose of influencing the conduct of another, and has been acted upon by the latter, this will, in general, be suffi-

of their being so authorised." In Howard *v.* Hudson, 1853, 22 L. J. Q. B. 341; Ld. Campbell observed: —"The party setting up such a bar to the reception of the truth must show, both that there was a *wilful* intent to make him act on the faith of the representation, and that he did so act." But Crompton, V.-C., says: "The rule takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not malo animo, but so far wilfully that the party making the representation on which the other acts *means* it to be acted upon in that way. That is the true criterion." See, further, on this subject, Foster *v.* Mentor Life Ass. Co., 1854, 23 L. J. Q. B. 145.

[1] Mangles *v.* Dixon, 1849, 19 L. J. Ch. 240. See, also, Att.-Gen. *v.* Naylor, 1864, 33 L. J. Ch. 151; Ramsden *v.* Dyson, 1865, L. R. 1 H. L. 129; Rolt *v.* White, 1862, 3 De G. J. & S. 360.

[2] Duke of Beaufort *v.* Neald, 1844, 12 Cl. & Fin. 249, H. L. See Graham *v.* Birkenhead Rail. Co., 1850, 12 Beav. 460; Kent *v.* Jackson, 1851, 21 L. J. Ch. 438 (Romilly, M.R.); Trickett *v.* Tomlinson, 1863, 13 C. B. N. S. 663; Pole *v.* Leask, 1864, 33 L. J. Ch. 155 (H. L.).

[3] Ld. Cranworth is said to have held that the rule does not apply unless there be *misrepresentation*. Sed qu. See Money *v.* Jorden, 1852, 20 L. J. Ch. 174; Pulsford *v.* Richards, 1853, 22 L. J. Ch. 559.

[4] Jorden *v.* Money, 1854, 23 L. J. Ch. 865 (H. L.) (Ld. Cranworth, C., and Ld. Brougham; Ld. St. Leonards diss.), overruling a decision of Romilly, M.R., in Money *v.* Jorden, 1852, 20 L. J. Ch. 174; Chadwick *v.* Manning, [1896] A. C. 231. See Maddison *v.* Alderson, 1883, 8 App. Cas. 473 (H. L.), and questioning Loffus *v.* Maw, 1862, 32 L. J. Ch. 49 (Stuart, V.-C.). See, also, post, § 1043.

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cient to entitle him to the assistance of the court for the purpose of realising such representation.[1]

§ 842.[2] A further example of a conclusive admission arising from conduct occurs in the case of a man cohabiting with a mistress, and treating her in the face of the world as his wife. Here, though he thereby acquires no rights against others, they possibly may do so against him. For instance, if the woman during such cohabitation be supplied with goods ostensibly for the use of the joint household, and the reputed husband be sued for their price, the jury will be justified, as in the case of a real wife, in dealing with the question as one of ordinary domestic agency.[3] The old doctrine of the presumptive agency of a real wife has, however, been encroached upon, if not actually set aside, by an enactment in the Married Women's Property Act, 1893,[4] that[5] "every contract hereafter entered into by a married woman, otherwise than as an agent, shall be deemed (*a*) to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising

[1] Hammersley *v.* Baron de Biel, 1845, 12 Cl. & Fin. 45, H. L. (Ld. Cottenham); id. (Ld. Campbell); Neville *v.* Wilkinson, 1782, 1 Bro. C. C. 543; Montefiori *v.* Montefiori, 1762, 1 W. Bl. 363; Bentley *v.* Mackay, 1862, 31 L. J. Ch. 697; Laver *v.* Fielder, 1862, 11 W. R. 245; Gale *v.* Lindo, 1687, 1 Vern. 475; Jorden *v.* Money, 1854, 23 L. J. Ch. 865 (H. L.); Money *v.* Jorden, 1852, 20 L. J. Ch. 174; Hutton *v.* Rossiter, 1854-5, 24 L. J. Ch. 106; Pulsford *v.* Richards, 1851, 22 L. J. Ch. 559; Yeomans *v.* Williams, 1865, L. R. 1 Eq. 184; Hodgson *v.* Hutchenson, 1712, 5 Vin. Abr. 522; Cookes *v.* Mascall, 1694, 2 Vern. 200; Wankford *v.* Fotherley, 1694; Luders *v.* Anstey, 1799, 4 Ves. 501; Middleton *v.* Pollock, Ex parte Wetherall, 1876, 4 Ch. D. 49. See Wright *v.* Snowe, 1848, 2 De G. & Sm. 321; Maunsell *v.* White, 1854, 4 H. L. C. 1039; Bold *v.* Hutchinson, 1855, 24 L. J. Ch. 285; Traill *v.* Baring, 1864, 33 L. J. Ch. 521.

[2] Gr. Ev. § 207, in part, as to first seven lines.

[3] Watson *v.* Threlkeld, 1798, 2 Esp. 637; Robinson *v.* Nahon, 1808, 1 Camp. 245; Munro *v.* De Chemant, 1815, 4 Camp. 215. See ante, § 192. Also, Mace *v.* Cadell, 1774, 1 Cowp. 233; recognised in Batthews *v.* Galindo, 1828, 4 Bing. 613.

[4] 56 & 57 V. c. 63. See Myles *v.* Burton, 1884, 14 L. R. Ir. 258.

[5] § 1.

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§§ 842, 843.

out of such contract any separate property which at that time or thereafter she is restrained from anticipating." By § 2 of the same Act,[1] a married woman's separate property which she is restrained from anticipating may be made liable for costs, and a receiver or a sale of it directed.

§ 843.[2] Yet another example of a conclusive admission arising from conduct is where a person knowingly permits his name to be used as one of the partners in a trading firm, or an existing joint-stock company, under such circumstances of publicity as to satisfy the jury that a stranger knew of it, and believed him to be a partner, for under such circumstances he is liable to such stranger in all transactions, in which the latter engaged and gave credit upon the faith of his being such partner.[3] The mere fact of a person agreeing to become a member of the *provisional committee* of an intended railway company, or even the fact of such person authorising his name to be published in a prospectus, which contains nothing more than the names of the provisional committee-men, will not indeed render him liable for contracts made by the other members or by the solicitor, for the purpose of promoting the objects in view; because such an intended association does not amount to a partnership, as it constitutes no agreement to share in profit and loss.[4] But if there be evidence that such person has *acted* with relation to the proposed scheme, as by attending meetings, giving directions, and the like, it will be for the jury to determine[5] whether he has not thereby authorised the managing committee, or the other members of the provisional committee, or the solicitor or secretary of the intended company, to pledge his credit for the necessary and ordinary expenses to be incurred in forming the company; and

[1] 56 & 57 V. c. 63.

[2] Gr. Ev. 207, in part.

[3] Dickinson *v.* Valpy, 1829, 10 B. & C. 128; Wood *v.* Duke of Argyll, 1848, 13 L. J. C. P. 96; Harrison *v.* Heathorn, 1843, 12 L. J. C. P. 203; Fox *v.* Clifton, 1830, 6 Bing. 792. See, also, Kell *v.* Nainby, 1829, 10 B. & C. 20; Guidon *v.* Robson, 1809, 2 Camp. 302.

[4] Reynell *v.* Lewis, and Wyld *v.* Hopkins, 1846, 16 L. J. Ex. 25. See Ex parte Cottle, 1850, 19 L. J. Ch. 368; Ex parte Roberts, 1850, 19 L. J. Ch. 368; Norris *v.* Cottle, 1850, 2 H. L. C. 647; Hutton *v.* Upfill, 1850, 2 H. L. C. 674; Bright *v.* Hutton, and Hutton *v.* Bright, 1851-52, 3 H. L. C. 341; M'Ewan *v.* Campbell, 1857, 2 Macq. 499 (H. L.).

[5] Williams *v.* Pigott, 1848, 17 L. J. Ex. 196; Bright *v.* Hutton, and Hutton *v.* Bright, 1851-52, 3 H. L. C. 341.

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if they decide this question in the affirmative, they may then give a verdict against him, on further finding that the work was done, and the credit given, on the faith of his being liable.[1] The fact of a person being on the committee of a club, and allowing his name to appear as a member of such committee is not such an admission as will in itself render him liable upon orders given by other members of the committee or by servants of the club for goods supplied to the club. The extent of the liability of a member of the committee depends upon the application of the ordinary law of principal and agent, and he will be liable only upon proof that he has expressedly or impliedly authorised the orders to be given.[2]

§ 844. On the same principle, if a man, by a misrepresentation, induces a railway company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he will be precluded from disputing the validity of the transfer to him, or from otherwise denying his character as a shareholder.[3] And, on the other hand, where a company has registered a person as a shareholder, and has induced him, on the faith of such registration, to pay a call, they will not be allowed to dispute his title to the shares.[4] Again, on the same principle, an infant who has deceived a tradesman by fraudulently representing himself to be of full age, and thus obtained credit for goods, will be held bound by his statement,[5]

[1] Reynell *v.* Lewis, and Wyld *v.* Hopkins, 1846, 16 L. J. Ex. 25; Lake *v.* D. of Argyll, 1844, 14 L. J. Q. B. 73. See Higgins *v.* Hopkins, 1848, 18 L. J. Ex. 113; Burnside *v.* Dayrell, 1849, 19 L. J. Ex. 46; Bailey *v.* Macaulay, 1849, 19 L. J. Q. B. 73; Rennie *v.* Clarke, 1850, 19 L. J. Ex. 278; Rennie *v.* Wynn, 1849, 19 L. J. Ex. 2; Ex parte Besley, 1850, 19 L. J. Ch. 382.

[2] Todd *v.* Emly, 1841, 7 M. & W. 427; 8 M. & W. 505; Steele *v.* Gourley, 1887, 3 T. L. R. 772; Draper *v.* Earl Manvers, 1892, 9 T. L. R. 73.

[3] Sheffield *v.* Manch. Rail. Co. *v.* Woodcock, 1841, 11 L. J. Ex. 26; Cheltenham & Gt. West. Union Rail. Co. *v.* Daniel, 1841, 2 Q. B. 281; In re North of Eng. Jt. St. Bk. Co., Ex parte Straffon's Exors., 1853, 22 L. J. Ch. 194; Taylor *v.* Hughes, 1844, 2 Jones & La T. 24 (Ir.). See Swan *v.* North Brit. Austral. Co., 1863, 32 L. J. Ex. 273.

[4] Hart *v.* Frontino, &c., Gold Mining Co., 1870, L. R. 5 Ex. 111; Re Bahia & Francisco Rail. Co. *v.* Tritten, 1868, L. R. 3 Q. B. 584. See, also, Webb *v.* Herne Bay Improving Com., 1870, L. R. 5 Q. B. 642; and Simm *v.* Anglo-Amer. Teleg. Co., 1880, 5 Q. B. D. 188 (C. A.).

[5] Ex parte, Unity Jt. St. Mutual Bank. Associat., In re King, 1858, 27 L. J. Bk. 33; Nelson *v.* Stocker, 1859, 28 L. J. Ch. 760. The old common law rule, as recognised in the following cases, is no longer law. Price *v.* Hewitt, 1852, 8 Ex. 146;

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§§ 844, 845.

and liable to pay the debt; and a person who has assumed to act as a broker of the city of London cannot, as against a party who has employed him, protect himself from a discovery of his dealings with such party, on the ground that his answer may expose him to penalties for having acted as a broker without being duly qualified.[1] An exception to the doctrine of estoppel by representation exists in the case of a married woman who is not precluded, as against a person whom she has misled by representations to the effect that her property is free from restraint on anticipation, from afterwards setting up that it is subject to such restraint.[2] So, too, a public body with public duties are not estopped from asserting a right to put an end to a nuisance by the fact that they have permitted and encouraged the acts which cause the nuisance, it being beyond their powers to make any binding agreement to permit such acts.[3]

§ 845. Conduct, again, furnishes an admission which is conclusive where parties have acted upon a state of facts mutually assumed as existing. In such a case their rights between themselves will depend on such assumption, and not upon the truth.[4] Accordingly, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he will not be permitted, as against parties to the proceedings, to deny their regularity;[5] the grantee of an annuity, whose duty it formerly was[6] to have the memorial properly enrolled, was not allowed to take advantage of his own neglect, and set up the want of enrolment against the grantor, although the statute declared that in case of non-enrolment annuity deeds should be void;[7] an agent or a workman who has knowingly rendered an untrue account

Liverpool Adelphi Loan Associat. *v.* Fairhurst, 1854, 23 L. J. Ex. 163; Bartlett *v.* Wells, 1861, 31 L. J. Q. B. 57; De Roo *v.* Foster, 1862, 12 C. B. N. S. 272.

Robinson *v.* Kitchin, 1856, 25 L. J. Ch. 441; Green *v.* Weaver, 1827, 1 Sim. 404.

[2] Bateman *v.* Faber, [1898] 1 Ch. 144.

[3] St. Mary, Islington, Vestry *v.* Hornsey Urban Council, [1900] 1 Ch. 695.

[4] M'Cance *v.* Lond. & N. W. Rail. Co., 1864, 34 L. J. Ex. 39.

[5] Like *v.* Howe, 1806, 6 Esp. 20; Clarke *v.* Clarke, 1806, 6 Esp. 61; Gouldie *v.* Gunston, 1816, 4 Camp. 381; Watson *v.* Wace, 1826, 5 B. & C. 153, explained in Heane *v.* Rogers, 1806, 9 B. & C. 586; Mercer *v.* Wise, 1800, 3 Esp. 219; Harmar *v.* Davis, 1817, 7 Taunt. 577; Flower *v.* Herbert, 1815, 2 Ves. sen. 326. See ante, §§ 817, 818.

[6] Under 53 G. 3, c. 141, now repealed by 17 & 18 V. c. 90.

[7] Molton *v.* Camroux, 1849, 2 Ex. 487; 4 Ex. 17.

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to his principal or employer, which has been adopted by the party to whom it was given, cannot afterwards gainsay it;[1] the receipt of a man who thereby has acknowledged that he has received money from an agent on account of his principal, and accredited the agent with the principal to that amount, is conclusive as to payment by the agent;[2] a landlord who has, with knowledge of all the facts, received rent from the widow of his lessee for several years is estopped from alleging afterwards that she has not taken out probate;[3] if a person having a right to property, whether real[4] or personal,[5] permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right; and if the owner of an instrument which purports to be transferable by delivery, deposit it with his broker or banker, he will be estopped, as against a bonâ fide holder for value, from denying that it was transferable.[6]

§ 846. Further examples of the doctrine that where *both* parties have acted upon a state of facts assumed by mutual consent to be true neither may subsequently repudiate his actions are as follow:—Trespass is not maintainable against a sheriff's officer who executes process against a man by a wrong name, either by taking his person, or seizing his goods, if before the process be sued out, he is asked his name, and gives such wrong one;[7] a

[1] Cave *v.* Mills, 1862, 31 L. J. Ex. 265; Skyring *v.* Greenwood, 1825, 4 B. & C. 281; Shaw *v.* Picton, 1825, 4 B. & C. 715.

[2] 3 St. Ev. 956. See Rice *v.* Rice, 1853, 23 L. J. Ch. 289; Hunter *v.* Walters, 1870, L. R. 11 Eq. 292. The usual acknowledgment in a policy of insurance of the receipt of premium from the assured is accordingly conclusive of the fact as between the underwriters and the assured, although not as between underwriters and brokers: Dalzell *v.* Mair, 1808, 1 Camp. 532; De Gaminde *v.* Pigou, 1812, 4 Taunt. 246; Anderson *v.* Thornton, 1853, 8 Ex. 425.

[3] Ranken *v.* M'Murphy, 1889, 24 L. R. Ir. 290.

[4] 3 Sug. V. & P. 458, 10th edit.; and id. 611, 13th edit.; recognised by the court in Sandys *v.* Hodgson, 1839, 9 L. J. Q. B. 31. See, also, Ramsden *v.* Dyson, 1865, L. R. 1 H. L. 129; and Doe *v.* Groves, 1847, 16 L. J. Q. B. 297; Dixon *v.* Muckleston, 1872, L. R. 8 Ch. 155 (L. C.); Re Lambert's Estate, 1884, 13 L. R. Ir. 234 (C. A.).

[5] Pickard *v.* Sears, 1837, 6 A. & E. 469; Gregg *v.* Wells, 1839, 10 A. & E. 98; Coles *v.* Bk. of England, 1839, 10 A. & E. 437.

[6] Goodwin *v.* Robarts, 1876, 1 App. Cas. 476 (H. L.); Rumball *v.* Metrop. Bk., 1877, 2 Q. B. D. 194.

[7] See Dunston *v.* Paterson, 1857, 26 L. J. C. P. 267; Kelly *v.* Lawrence, 1864, 33 L. J. Ex. 197; Price *v.* Harwood, 1811, 3 Camp. 108; cited and recognised in Fisher *v.* Magnay, 1843, 12 L. J. C. P. 276. See, also, Reeves *v.* Slater, 1827, 7 B. & C. 486. As to a ca. sa., see Morgans *v.* Bridges, 1818, 2 Stark. R. 314, and Magnay *v.* Fisher, 1843, 5 M. & Gr. 778, apparently overruling

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§§ 846, 847. party, who has entered into a bond by a wrong name, and is sued in that name, would be estopped from denying that the name in which he was sued was his real name.[1] Where, on a compulsory reference, although the award was not made within the period limited by the statute, both parties have after the lapse of that period continued to attend before the arbitrator without objecting to his jurisdiction, the losing party is estopped from alleging that the time has not been enlarged, either by the court, or by the written consent of the parties;[2] and where a judge, had tried a cause without a jury, with the consent of both parties who appeared before him, the unsuccessful party was not allowed afterwards to object that no written consent had been drawn up as the statute required.[3] Similarly where questions, upon an examination of witnesses, have been received by the examiner without objections by the persons against whom the evidence is offered then the questions and answers will be received at the trial.[4]

§ 847. Again, if the members of an incorporated company allow a solicitor to appear for them as defendants, and he consents to a reference, they cannot, after the award is made, object to the submission, on the ground that the solicitor had no authority under seal to defend or refer the cause;[5] a judge's order which was bad as a proceeding under a now repealed Interpleader Act,[6] for want of a statement of consent upon its face, was nevertheless held to be conclusive upon the parties, as they had by their conduct agreed to submit the matter in dispute to the decision of the judge;[7] a lessor who, after giving notice to his lessee to do repairs within the period prescribed by the lease,

Coote *v.* Leighworth, 1596, Moore, 557, and dictum (Ld. Hale) in Thurbane et al., 1664, Hardr. 323, though in Freeman *v.* Cooke, 1848, 18 L. J. Ex. 114, Parke, B., intimated that it had always been the opinion of the profession that Coote *v.* Leighworth, 1596, Moore, 557, was law.

[1] R. *v.* Wooldale, 1844, 14 L. J. M. C. 13 (Wightman, J., citing Maby *v.* Shepherd, 1623, Cro. Jac. 640, and Hyckman *v.* Shotbolt, 1567, 3 Dyer, 279 b.). See, also, 3 & 4 W. 4, c. 42, § 11, and Williams *v.* Bryant, 1839, 9 L. J. Ex. 47.

[2] Tyerman *v.* Smith, 1856, 25 L. J. Q. B. 359. See, also, Haines *v.* E. India Co., 1856, 6 Moore, Ind. App. 467 (P. C.).

[3] Andrewes *v.* Elliott, 1856, 25 L. J. Q. B. 336; 17 & 18 V. c. 125, § 1.

[4] Robinson *v.* Davies, (1879), 5 Q. B. D. 25.

[5] Faviell *v.* East. Cos. Rail. Co., 1848, 17 L. J. Ex. 223, 297.

[6] 1 & 2 W. 4, c. 58.

[7] Harrison *v.* Wright, 1845, 14 L. J. Ex. 196.

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§§ 847, 848.

so conducted himself as to lull the lessee asleep and to lead him to suppose that he might refrain from doing the repairs, was not allowed (although a mere parol licence to break such covenant will not justify a breach thereof[1]) to insist upon a covenant of forfeiture, on the ground that the repairs had not been finished within the time fixed for them;[2] an action for forfeiture by breach of a covenant to insure on the tenant's part, qualified by an option given to the landlord to insure if the tenant made default, and to add the premiums to his rent, was allowed to be defeated by proof that the landlord had represented to the tenant that he had exercised the power, and had himself duly insured the premises;[3] while a tenant who has paid rent, and acted as such, is not (as stated more fully in another place,[4]) permitted to set up a superior title of a third person against his lessor, since he derived possession from him as tenant, and therefore cannot be allowed to repudiate that relation.

§ 848. The doctrine of estoppel (or admission by conduct) is also applied to the respective relations of licensor and licensee, bailor and bailee, and principal and agent; it being clear that neither licensees, nor bailees, nor agents, can be permitted to dispute the respective titles of their licensors, bailors, or principals.[5] Accordingly a licensee under a patentee is estopped from disputing the validity of the patent, so long as the licence continues in force;[6] and a warehouseman, wharfinger, banker, solicitor, agent, or other depositary of goods or moneys (not being a mere pledgee) who has once acknowledged a person's title, and agreed to hold goods, or moneys subject to his order, or to sell goods and to account for the proceeds, will be estopped

[1] Doe *v.* Gladwin, 1845, 14 L. J. Q. B. 189; West *v.* Blakeway, 1841, 10 L. J. C. P. 173.

[2] Hughes *v.* Metrop. Rail. Co., 1877, 2 App. Cas. 439 (H. L.). But see Kennedy *v.* Earl of Essex, 1891, 28 L. R. Ir. 586; Robinson *v.* Wakefield, 1892, 30 L. R. Ir. 547.

[3] Doe *v.* Sutton, 1841, 9 C. & P. 706; explained by Patteson, J., in Doe *v.* Gladwin, 1845, 14 L. J. Q. B. 189; Doe *v.* Roe, 1825, 2 C. & P. 246. See ante, §§ 804—808.

[4] Ante, §§ 101—103.

[5] Dixon *v.* Hammond, 1819, 2 B. & Ald. 310; Collett *v.* Hubbard, 1846, 2 Coop. 94; Zulueta *v.* Vinent, 1851-2, 1 De G. M. & G. 315; Phillips *v.* Hall, 1832, 8 Wend. 610 (Am.); Drown *v.* Smith, 1825, 3 New Hamp. 299 (Am.); Eastman *v.* Tuttle, 1823, 1 Cowen, 248 (Am.); M'Neil *v.* Philip, 1821, 1 M. & C. 392 (Am.); Chapman *v.* Searle, 1825, 3 Pick. 38 (Am.); Jewett *v.* Torry, 1814, 11 Mass. 219 (Am.); Lyman *v.* Lyman, 1814, 11 Mass. 317 (Am.).

[6] Crossley *v.* Dixon, 1863, 10 H. L. C. 293; Clark *v.* Adie, 1877, 2 App. Cas. 423 (H. L.).

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§§ 848, 849. from setting up the title of a third person to the same goods or moneys, or from otherwise defeating the rights of his bailor or principal, against his own manifest obligations to him.[1] An exception to the general rule will, however, be allowed, where the bailment has been determined by what is equivalent to an eviction by title paramount,[2] and, also, where the bailor or principal has obtained the goods fraudulently or tortiously from the third person,[3] provided the defendant in such last case can show that he was unacquainted with the circumstances when he made the admission,[4] and that such third person has actually made a claim to the goods or moneys in question.[5] Perhaps the bailor's title might also be impugned, should the circumstances show that he, in connection with some third person, had practised a fraud on the bailee by representing goods to belong to the bailor, which, in fact, were the property of such third person, if proof were also given that the defendant, in consequence of the fraudulent misrepresentation, had sustained any real injury.[6]

§ 849. Moreover, where a person *pledges* property to which he has no title, the pledgee is not estopped from delivering it to the rightful owner. For, on an ordinary pledge, the pledgor impliedly undertakes that the property is his own, and the pledgee merely undertakes that he will return it to the pledgor, provided it be not shown to belong to another.[7] A common carrier, also, being bound to receive goods for carriage, and having no means of making inquiry as to their ownership, is at

Henderson *v.* Williams, 1895, 1 Q. B. 521; Gosling *v.* Birnie, 1831, 7 Bing. 346; Woodley *v.* Coventry, 1863, 32 L. J. Ex. 185; Stonard *v.* Dunkin, 1810, 2 Camp. 344; Harman *v.* Anderson, 1809, 2 Camp. 243; Knights *v.* Wiffen, 1870, L. R. 5 Q. B. 660; Hawes *v.* Watson, 1824, 2 B. & C. 540; Dixon *v.* Hammond, 1819, 2 B. & Ald. 310; Roberts *v.* Ogilby, 1821, 9 Price, 269; Anon. (Gould, J.) cited 9 Esp. 115 (undated), recognised by Ld. Kenyon in Laclough *v.* Towle, 1800, 3 Esp. 114; Farringdon *v.* Clerk, 1782, 3 Doug. 124; Holl *v.* Griffin, 1833, 10 Bing. 246; Nickolson *v.* Knowles, 1820, 5 Madd. 47; Evans *v.* Nichol, 1841, 3 M. & Gr. 614. See, however, Thorne *v.* Tilbury, 1858, 27 L. J. Ex. 407.

[2] Biddle *v.* Bond, 1865, 34 L. J. Q. B. 137.

[3] Hardman *v.* Wilcock, 1832, 9 Bing. 382, n.; Biddle *v.* Bond, 1865, 34 L. J. Q. B. 137.

[4] Per Alderson, J., in Gosling *v.* Birnie, 1831, 7 Bing. 346; Ex parte Davies, Re Sadler, 1881, 19 Ch. D. 86.

[5] Betteley *v.* Reid, 1843, 12 L. J. Q. B. 172.

[6] Scott *v.* Crawford, 1842, 4 M. & Gr. 1031.

[7] Cheesman *v.* Exall, 1851, 20 L. J. Ex. 209.

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liberty to dispute the title of the person from whom he has received them; and may establish a defence by proving that he has delivered the goods to the real owner on his claiming them.[1] A vendor, however, who has sold goods to a party as a sole purchaser, and has directed his factors to weigh them over to such party, and to enter them in his name in their books, cannot, after such sale and transfer, dispute his title as sole proprietor, or detain the goods, on the authority of a third person, who claims to be a joint purchaser.[2]

§ 850. Further examples of conclusive admissions (or estoppels) by conduct arise in connection with bills of exchange. Thus, in an action against the acceptor, the defendant cannot show that his signature has been forged if he has accredited a bill, and induced the plaintiff to take it, by saying that it was his, and would be duly paid.[3] Moreover, although at one time it was deemed law, that no consideration of estoppel as between the parties could have any weight where the rights of the *revenue* intervened, and that, consequently, the maker of a cheque payable to *bearer* on demand[4] might defraud even a bonâ fide holder for value, by proving that the cheque was post-dated, and, as such, inadmissible in evidence without a bill stamp,[5] this doctrine has now been repudiated.[6] The law now is, that if a cheque,—whether payable to bearer or to order,—appears, when tendered in evidence, to bear on its face a sufficient stamp, the court will receive the document, and will not allow any proof to be given that it had actually been post-dated, and that the holder had taken it with knowledge of that fact.[7]

§ 851. The *acceptance* of a bill is, moreover, deemed a *conclusive admission*,[8] as against the acceptor, of the existence of the drawer and the genuineness of his signature,[9] and of his capacity to

Sheridan *v.* The New Quay Co., 1858, 28 L. J. C. P. 58.

[2] Kieran *v.* Sandars, 1837, 6 A. & E. 515.

[3] Leach *v.* Buchanan, 1803, 4 Esp. 228; recognised in Sanderson *v.* Collman, 1842, 11 L. J. C. P. 270.

[4] Whistler *v.* Forster, 1833, 32 L. J. C. P. 161; Austin *v.* Bunyard, 1865, 34 L. J. Q. B. 217; Bull *v.* O'Sullivan, 1871, L. R. 6 Q. B. 209.

[5] Field *v.* Woods, 1837, 7 A. & E. 114; recognised in Steadman *v.* Duhamel, 1845, 14 L. J. C. P. 270.

[6] Austin *v.* Bunyard, 1865, 34 L. J. Q. B. 217.

[7] Royal Bank of Scotland *v.* Tottenham, 1894, 2 Q. B. 715; Gatty *v.* Fry, 1877, L. R. 2 Ex. D. 265; Emanuel *v.* Robarts, 1868, 34 L. J. Q. B. 217.

[8] See 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 54.

[9] Id. § 54 (2), (a). Sanderson *v.*

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§ 851. draw;[1] and if the bill be payable to the order of the drawer, of his capacity to indorse;[2] and if it be drawn by procuration, of the authority of the agent to draw in the name of the principal.[3] In this respect it matters not whether the bill be drawn before or after the acceptance.[4] In the case of a bill payable to the order of a third person, the acceptor is also estopped from denying as against the holder, the existence of the payee and his then capacity to indorse.[5] But the acceptance is not an admission on the part of the acceptor, either of the signature *of the payee*, though he be the same party as the drawer,[6] or of that of *any other indorser*;[7] and this, too, although, at the time of the acceptance, the indorsements were on the bill.[8] Nor does it admit that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same;[9] nor, where the bill has been drawn in the partnership name and made payable to the firm's order, does it estop the acceptor from showing that such bill was in fact not indorsed by the firm nor negotiated for any partnership purpose;[10] nor does it, if it be given on a bill payable to the order of the drawer on which the name of a *real* person as drawer and indorser is *forged*, if given in *ignorance* of the forgery, preclude the acceptor from denying

Collman, 1842, 11 L. J. C. P. 270; Bass *v.* Clive, 1815, 4 M. & Selw. 13.

[1] Id. See Haly *v.* Lane, 1741, 2 Atk. 182.

[2] Taylor *v.* Croker, 1803, 4 Esp. 187; Pitt *v.* Chappelow, 1841, 10 L. J. Ex. 487; Drayton *v.* Dale, 1823, 2 B. & C. 293. All these cases were recognised by the court in Sanderson *v.* Collman, 1842, 11 L. J. C. P. 270. See, also, Braithwaite v. Gardiner, 1845, 15 L. J. Q. B. 187, where, in an action by indorsee against acceptor, defendant was held estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given, and that his assignees had demanded payment. So, in a similar action, it was held that the defendant could not plead, under the old law, that the drawer and first indorser was a married woman from the date of the drawing down to the time of the indorsing of the bill: Smith *v.* Marsack, 1848, 18 L. J. C. P. 65. See ante, § 842.

[3] 45 & 46 V. c. 61, § 54, §§ 2 (a). Robinson *v.* Yarrow, 1817, 7 Taunt. 455; Jones *v.* Turnour, 1830, 4 C. & P. 204.

[4] Schultz *v.* Astley, 1836, 2 Bing. N. C. 544; Hallifax *v.* Lyle, 1849, 3 Ex. 446; Lond. & S. West. Bk. *v.* Wentworth, 1880, 5 Ex. D. 96. But see Baxendale *v.* Bennett, 1878, 3 Q. B. D. 525 (C. A.).

[5] 45 & 46 V. c. 61, § 54, §§ 2 (c).

[6] Forster *v.* Clements, 1809, 2 Camp. 17; Macferson *v.* Thoytes, 1790, Peake. R. 20; Bosanquet *v.* Anderson, 1806, 6 Esp. 44; Cooper *v.* Meyer, 1830, 10 B. & C. 471.

[7] Id.

[8] Smith *v.* Chester, 1787, 1 T. R. 654; Robarts *v.* Tucker, 1851, 20 L. J. Q. B. 270.

[9] Robinson *v.* Yarrow, 1817, 7 Taunt. 455; recognised in Beeman *v.* Duck, 1843, 12 L. J. Ex. 198.

[10] Garland *v.* Jacomb, 1873, L. R. 8 Ex. 216.

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the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit.[1] If, however, an *acceptor*, with *knowledge* of the forgery, puts the bill in circulation, he will be estopped by that conduct from disputing the validity of the indorsement equally with that of the drawing.[2] And if a bill be drawn in a wholly *fictitious* name, and the handwriting of the indorsement be the same as that of the drawing, the acceptor will also be estopped from denying it, because he admits that the bill is drawn by *somebody*, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking is, that he will pay to the signature of the same person who signed for the drawer.[3]

§ 852. It will have been noticed that whilst an acceptor is estopped from denying the signature of the drawer he is not estopped from denying that of an indorser who has indorsed the bill before acceptance. The reasons usually assigned for this difference are, that an *acceptor* is only presumed to be acquainted with the handwriting of the drawer, and it consequently is sufficient if he ascertains that his signature is genuine; that he is not bound to look at the back of the bill at all; that, even if he were, he could not be supposed to know the handwriting of indorsers, who would probably be strangers to him; and that a different rule would raise nice questions of fact in every case as to whether the bill was indorsed before or after acceptance, and would consequently embarrass the circulation of negotiable securities, by rendering the position of acceptors hazardous and undefined.[4]

§ 853. Similar to the estoppels which bind an acceptor are those which preclude the *drawer* of a bill and the *maker* of a promissory note from denying to a holder in due course the existence of the payee and his capacity to indorse at the time the bill or note was drawn;[5] and those which similarly preclude an *indorser* from denying the genuineness and regularity of the drawer's signature

[1] Beeman *v.* Duck, 1843, 12 L. J. Ex. 198.

[2] Id.

[3] Cooper *v.* Meyer, 1830, 10 B. & C. 468, explained and recognised by Parke, B., in Beeman *v.* Duck, 1843, 12 L. J. Ex. 198. See, also, Ashpital *v.* Bryan, 1864, 19 L. J. Ex. 82; Phillips *v.* Im Thurn, 1866, L. R. 1 C. P. 463.

[4] See Story, Bills, § 263; Robinson *v.* Yarrow, 1817, 7 Taunt. 455; Smith *v.* Chester, 1787, 1 T. R. 654; Canal Bk. *v.* Bk. of Albany, 1841, 1 Hill, N. Y. R. 287 (Am.).

[5] 45 & 46 V. c. 61 § 55, §§ 1 (b); Collis *v.* Emett, 1790, 1 H. Bl. 313.

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§§ 853, 854.

and all previous indorsements.[1] An *indorser* is moreover precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill and that he had then a good title thereto.[2]

§ 854. Having now fully discussed the effect of admissions which have been acted upon, we may point out that those admissions which have *not* been acted upon either because *they were originally made without any intention of being acted upon*, or because for any other reason they, in fact, remain *not acted upon, or have not altered the situation of the opposite party*, are not conclusive, though they are receivable in evidence against the parties making them.[3] Thus, if A. contracts to sell goods to B., and gives him a delivery order, he may, on B.'s bankruptcy, provided B. has neither paid for them nor sold them to a third party, show that the delivery order was invalid, and therefore did not amount to a constructive delivery of the goods:[4] the court will not treat the alteration of its locality, after complaint, as conclusive evidence that a trade was a nuisance;[5] nor will it, in a petition for damages by reason of adultery,[6] regard an admission by the defendant that at some other and different time the "*teterrima causa*" was the wife of the plaintiff as conclusive evidence that she was the wife of the plaintiff at the time when the adultery was committed;[7] a sheriff's return, though conclusive, in the particular cause in which it is made, or for the purposes of an attachment, does not, in any other action or proceeding, operate as an estoppel, either against the sheriff or against his bailiff;[8] a creditor is not

[1] Free *v.* Hawkins, 1817, Holt, N. P. R. 550 (Gibbs, C.J.); McGregor *v.* Rhodes, 1856, 6 E. & B. 266; 45 & 46 V. c. 61, § 55, §§ 2 (b).

[2] 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 55, sub-s. 2 (c).

[3] See Howard *v.* Hudson, 1853, 22 L. J. Q. B. 341; White *v.* Greenish, 1861, 11 C. B. N. S. 209; Foster *v.* Mentor Life Assur. Co., 1854, 23 L. J. Q. B. 145; Carr *v.* Lond. & N. West Rail. Co., 1875, L. R. 10 C. P. 307; Coventry *v.* Gt. East. Rail. Co., 1883, 11 Q. B. D. 776.

[4] Lackington *v.* Atherton, 1844, 13 L. J. C. P. 140.

[5] R. *v.* Neville, 1791, Peake, R. 91.

[6] See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

[7] Morris *v.* Miller, 1767, 4 Burr. 2057; further explained in Rigg *v.* Curgenven, 1769, 2 Wils. 399.

[8] Standish *v.* Ross, 1849, 19 L. J. Ex. 185; Brydges *v.* Walford, 1817, 6 M. & Selw. 42; Jackson *v.* Hill, 1839, 10 A. & E. 477; Remmett *v.* Lawrence, 1850, 20 L. J. Q. B. 25; Levy *v.* Hale, 1849, 29 L. J. C. P. 127; Stimson *v.* Farnham, 1871, L. R. 7 Q. B. 175.

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estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account and towards the satisfaction of the debt mentioned in the writ;[1] and a person who brought an action of trover for a dog, was held not to be precluded from proving his title to it, though he had previously authorised a third party (against whom the defendant had brought an action) to deliver it to the defendant, at the same time demanding it back on behalf of the plaintiff as being the latter's property.[2] In these,[3] and the like cases,[4] no wrong is done to the other party, by receiving any legal evidence to show that the admission was erroneous, and by leaving the whole evidence, including the admission, to be weighed by the jury.

§ 855. The doctrine that a person is not estopped by representations which were not intended to be acted upon, or have in fact not been acted upon, has in one case been extended to cases in which the representations were such that they *ought not* to have been acted upon. In an action against a sheriff for seizing the plaintiff's goods under an execution against his brother, the plaintiff, fearing an execution, had removed his goods to the brother's house, and when the sheriff's officer came there had (erroneously supposing that the writ was against himself) warned the officer not to seize the goods, as they belonged to his brother. On the officer producing a writ against the brother, before the goods were actually seized, the plaintiff told the sheriff officer that such goods were the property of a third party, and the officer, disregarding this last statement, seized and sold the goods, as belonging to the brother. The jury found that the goods were the plaintiff's, but that, before the seizure, he had falsely stated to the officer that they belonged to his brother, and that the officer was thereby induced to seize them as his brother's; thereupon a verdict was entered for the plaintiff, on the grounds, first, that the plaintiff did not intend to induce the officer to seize the goods as those of the brother; and next, that no reasonable man would have seized

[1] Holmes *v.* Clifton, 1839, 10 A. & E. 673, overruling Beynon *v.* Garrat, 1824, 1 C. & P. 154.

[2] Sandys *v.* Hodgson, 1839, 9 L. J. Q. B. 31.

[3] Gr. Ev. § 209, four lines.

[4] See ante, §§ 804—808. See, also, Machu *v.* Lond. & S. West. Rail. Co., 1848, 17 L. J. Ex. 271; Greenish *v.* White, 1861, 31 L. J. C. P. 93.

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§§ 855, 856. the goods on the faith of the plaintiff's representations *taken altogether*.[1]

§ 856.[2] Admissions have also been held conclusive on grounds of *public policy* in some few cases connected with public justice and government. For instance, in an action for penalties for election bribery, a man who had given money to another for his vote is not permitted to say that such latter had no right to vote;[3] where the owners of a stage coach took up more passengers than allowed, and an injury was alleged as having arisen from overloading, their conduct was held to be conclusive evidence that the accident was occasioned by the cause assigned;[4] one who has officiously intermeddled with the goods of another recently deceased, is, in favour of creditors, estopped from denying that he is executor;[5] an executrix who treats the goods of her testator as the property of her husband, will not be allowed to object to their being taken in execution for her husband's debt;[6] where the statute made it illegal to publish reports of the meetings of suppressed associations, a report stating that a suppressed association had held a meeting and purporting to report the proceedings at that meeting, was held, even in a criminal case, to be an admission that such a meeting had in fact taken place;[7] and a shipowner, whose ship after being forfeited for breach of the revenue laws, had been given up to him on making an application, verified by oath, that the forfeiture had been incurred by the master ignorantly and without fraud, was not permitted afterwards, in an action by the latter against himself for wages on the same voyage, to gainsay this statement, and to prove the misconduct of the master, even on proving that the fraud had come to his knowledge subsequently.[8]

[1] Freeman *v.* Cooke, 1848, 18 L. J. Ex. 114.

[2] Gr. Ev. § 210, in part.

[3] Combe *v.* Pitt, 1764, 3 Burr. 1586; Rigg *v.* Curgenven, 1769, 2 Wils. 399.

[4] Israel *v.* Clark, 1803, 4 Esp. 259. Sed query this case. It is difficult to see why the evidence was *conclusive*, although no doubt it was *some evidence* of negligence.

[5] Reade's case, 1604-5, 5 Co. Rep. 33.

[6] Quick *v.* Staines, 1798, 1 Bos. & P. 203. See Fenwick *v.* Laycock, 1841, 11 L. J. Q. B. 146.

[7] Reg. *v.* Sullivan, 1887, 20 L. R. Ir. 550.

[8] Freeman *v.* Walker, 1829, 6 Greenl. 68 (Am.). But a sworn entry at the custom-house of certain premises, as being rented by A., B., and C., as partners, for the sale of beer, though conclusive in favour of the Crown, is not conclusive evidence o the partnership, in a civil suit, in

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§ 857.[1] Moreover, an admission is not rendered conclusive against the party by the mere fact that it was made under oath; though this circumstance greatly adds to its weight and throws upon the party the burthen of showing that it was made under a mistake which was both innocent and is perfectly clear. Thus, in a prosecution under the game laws, proof of the defendant's oath, under an Income Act then in force, that the yearly value of his estate was less than 100*l.*, was held not quite conclusive against him, though very strong evidence of the fact.[2] The same principle is applied where the fact sworn to was not, as it might be considered in the above case, a matter of judgment, but was purely a matter of fact within the knowledge of the party swearing.[3] The defendant's belief of a fact, sworn to in an old answer in Chancery, is also admissible evidence against him, but not conclusive.[4]

§ 858.[5] Admissions *in deeds* have already been considered in regard to parties and privies,[6] between whom they are generally regarded as estoppels, if properly pleaded.[7] Such admissions, even when not technically estoppels, are entitled to great weight, from the solemnity of their nature.[8] When, however, they are offered in evidence by a stranger, the adverse party may repel their effect, in the same manner as though they were only parol admissions[9].

§ 859.[10] Various other admissions, even when they are in writing, are not conclusive if they have never been acted upon by another to his prejudice, nor fall within the reasons before mentioned for

favour of a stranger. Ellis *v.* Watson, 1818, 2 Stark. R. 453. The difference between this case and that in the text may be that, in the latter, the owner gained an advantage to himself, which was not the case in the entry of partnership; it being only incidental to the principal object, namely, the designation of the place where an excisable commodity was sold.

[1] Gr. Ev. § 210, in part.

[2] R. *v.* Clarke, 1799, 8 T. R. 220.

[3] Thornes *v.* White, 1835, Tyr. & Gr. 110.

[4] Doe *v.* Steel, 1811, 3 Camp. 115. Statements of fact contained in answers in Chancery were at common law always admissible against the party; but not strictly conclusive, merely because they were sworn to. See B. N. P. 236, 237; Cameron *v.* Lightfoot, 1777, 2 W. Bl. 1190; Grant *v.* Jackson, 1793, Peake, R. 203; Studdy *v.* Sanders, 1823, 2 D. & R. 347; De Whelpdale *v.* Milburn, 1818, 5 Price, 485. Cf. infra, note [8], § 859.

[5] Gr. Ev. § 211, in great part.

[6] Ante, §§ 91—100.

[7] Fishmongers' Co. *v.* Robertson, 1843, 5 M. & Gr. 193; Bowman *v.* Rostron, 1834, 2 A. & E. 295.

[8] Doe *v.* Stone, 1846, 15 L. J. C. P. 234.

[9] R. *v.* Neville, 1791, Peake, R. 91; Woodward *v.* Larking, 1801, 3 Esp. 286; May. of Carlisle *v.* Blamire, 1807, 8 East, 487.

[10] Gr. Ev. § 212, in great part.

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§§ 859, 860. estopping the party from gainsaying them. Such admissions are left to be weighed with other evidence by the jury. *Receipts*, mere acknowledgements, either for goods or money, and whether on separate papers,[1] or indorsed on deeds,[2] or on negotiable securities,[3] are of this nature, as are also bankers' *pass-books*;[4] an *adjustment of a loss* on a policy of insurance, which has been made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances:[5] and so, too, are *accounts rendered*, such as a solicitor's bill,[6] and the like.[7] An old bill in Chancery is not admissible at all against the plaintiff in proof of the *admissions* it contains, since the facts stated therein are regarded as nothing more than the mere suggestions of counsel.[8]

§ 860. An *inventory* of the personal estate of a deceased person, exhibited by a personal representative on the citation of a person interested, either in the Ecclesiastical Court under the old law, or in the Probate Division of the High Court under the new law,[9] being sworn to by the exhibitant, will be primâ facie evidence of assets; and so also will a *declaration* of the personalty of a testator or intestate, which has been made on oath by his representative before a final settlement of accounts,[10] and since the first of June,

[1] Skaife *v.* Jackson, 1824, 3 B. & C. 421; Farrar *v.* Hutchinson, 1839, 9 A. & E. 641; Wallace *v.* Kelsall, 1840, 10 L. J. Ex. 12; Bowes *v.* Foster, 1858, 26 L. J. Ex. 262; Lee *v.* Lanc. & Yorks. Rail. Co., 1871, L. R. 6 Ch. 527. These cases have virtually overruled Alner *v.* George, 1808, 1 Camp. 392. For American cases, see Harden *v.* Gordon, 1823, 2 Mason, 541; Fuller *v.* Crittenden, 1832, 9 Conn. 401; Ensign *v.* Webster, 1799, 1 Johns. 145; Putnam *v.* Lewis, 1811, 8 Johns. 389; Stackpole *v.* Arnold, 1814, 11 Mass. 27; Tucker *v.* Maxwell, 1814, 11 Mass. 143; Williamson *v.* Scott, 1821, 17 Mass. 249.

[2] Straton *v.* Rastall, 1788, 2 T. R. 366; Lampon *v.* Corke, 1822, 5 B. & Ald. 606. As to cases where the receipt of money is mentioned in the deed itself, see ante, § 96.

[3] Graves *v.* Key, 1832, 3 B. & Ad. 313.

[4] Commercial Bk. of Scotland *v.* Rhind, 1860, 3 Macq. 643 (H. L.).

[5] Luckie *v.* Bushby, 1853, 22 L. J. C. P. 220; Reyner *v.* Hall, 1813, 4 Taunt. 725; Shepherd *v.* Chewter, 1808, 1 Camp. 274; Adams *v.* Sanders, 1829, M. & M. 373; Christian *v.* Coombe, 1796, 2 Esp. 489.

[6] Loveridge *v.* Botham, 1797, 1 B. & P. 49.

[7] See Bacon *v.* Chesney, 1816, 1 Stark. R. 193; Dawson *v.* Remnant, 1806, 6 Esp. 24.

[8] Boileau *v.* Rutlin, 2 Ex. 678; Doe *v.* Sybourn, 1796, 7 T. R. 3; cf. supra, note [4] to § 857.

[9] 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), as amended by "The Statute Law Revision Act, 1892," (55 & 56 V. c. 19); Rules of 1862 for Ct. of Prob. in contentious business, r. 76, and Form No. 27.

[10] See Rules of 1862 for Reg. of Ct. of Prob. in non-contentious business, Form No. 18; and Rules for Dist. Reg. of Ct. of Prob., Form No. 18, and cases cited in note [2], p. 603.

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§§ 860, 861.

1881, an affidavit received by the Commissioners of Inland Revenue from any person applying for probate or letters of administration, veryifying the account of the deceased's estate or effects;[1] and the executor or administrator, if he has pleaded plene administravit, will be forced to show, either the non-existence of such assets, or that they have not reached his hands, or that they have been duly administered;[2] and perhaps in the case last named the affidavit will even be sufficient proof that such assets have been realised in due course.[3] An old probate stamp,[4] though slight evidence of assets to the amount covered thereby, was not alone sufficient to throw upon executors the burthen of proving the non-receipt of such assets.[5] Coupled, however, with proof, either of long acquiescence in the payment of the duty, or of other suspicious circumstances, it furnished a presumption of assets received, which executors found it difficult to rebut.[6]

§ 861.[7] Evidence of *oral admissions* ought always to be *received with great caution*.[8] Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning,[9] or the witness may have misunderstood him,[10] or may purposely misquote the expression used.[11] It also sometimes happens, that the witness, by unintentionally altering a few words, will give an effect to the statement completely at variance

[1] 44 V. c. 12 ("The Customs and Inland Revenue Act, 1881"), §§ 27—29. This law has prevailed in Ireland for some years past. See Rowan *v.* Jebb, 1846, 10 Ir. L. R. 216.

[2] Giles *v.* Dyson, 1815, 1 Stark. R. 32; explained in Stearn *v.* Mills, 1833, 4 B. & Ad. 657; Parsons *v.* Hancock, 1829, M. & M. 330; Hickey *v.* Hayter, 1795, 1 Esp. 313; Young *v.* Cawdrey, 1819, 8 Taunt. 734. See Hutton *v.* Rossiter, 1854-5, 24 L. J. Ch. 106.

[3] 44 V. c. 12, § 31. To understand the new law respecting probate and legacy duty, and duties on accounts, see, and study, 44 V. c. 12, §§ 26—43.

[4] An affidavit stamp is now substituted for the probate stamp. See 44 V. c. 12, § 27.

[5] Mann *v.* Lang, 1835, 3 A. & E. 702; Stearn *v.* Mills, 1833, 4 B. & Ad. 657. These cases overrule Foster *v.* Blakelock, 1826, 5 B. & C. 328.

[6] Mann *v.* Lang, 1835, 3 A. & E. 702; Curtis *v.* Hunt, 1824, 1 C. & P. 180; Rowan *v.* Jebb, 1846, 10 Ir. Law R. 216; Lazenby *v.* Rawson, 1854, 24 L. J. Ch. 482.

[7] Gr. Ev. § 200, in part.

[8] See post, § 862.

[9] See Gospel of St. John, ch. 21, vv. 21—23.

[10] See St. Matthew, ch. 27, vv. 46, 47.

[11] See, and compare, St. John, ch. 2, vv. 18—21, and St. Matthew, ch. 26, vv. 60, 61.

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§ 861. with what the party actually said.[1] But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.[2]

[1] Ante, § 216, n. [3]. Alciatus expresses the sense of the civilians to the same effect, where, after speaking of the weight of a judicial admission, "propter majorem certitudinem, quam in se habet," he adds: "Quæ ratio non habet locum quando ista confessio probaretur per testes; imo est *minus certa cæteris probationibus*," &c.: Alciat. de Præs., Pars. 2, Col. 682, n. 6. See Poth. Obl. App. No. 16, § 13; Lench *v.* Lench, 1805, 10 Ves. 517.

[2] Rigg *v.* Curgenven, 1769, 2 Wils. 395; Glassf. Ev. 356; Com. *v.* Knapp, 1830, 9 Pick. 507 (Am.). As to *Admissions* by *Agents*, see ante, §§ 602—605.

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CHAPTER X.

CONFESSIONS.

§ 862. THE only topic under the general head of admissions which remains to be discussed, is that of CONFESSIONS of guilt in criminal cases. In such cases evidence of oral confession of guilt ought—as just remarked in regard to admissions in civil proceedings,[2]—to be *received with great caution*.[3] Not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory,[4] but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof,[5]—together with the character of the witnesses, who are

§ 862.

[1] Gr. Ev. § 214, in great part.

[2] Ante, § 861.

[3] Macaulay has remarked, "Words may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A particle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence." History of England, vol. 1, ch. 5, p. 583.

[4] See Earle *v.* Picken, 1833, 5 C. & P. 542; R. *v.* Simons, 1834, 6 C. & P. 540; Coleman's case, 1748, cited Joy on Confession, 108 (Ir.). In Resp. *v.* Fields, 1822-4, Peck, R. 140 (Am.), the court observed, "How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning! For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do."

[5] For a curious instance of this kind of exaggeration, see the evidence adduced in support of Hugh Macauley Boyd's claim to the authorship of Junius. 1 Woodfall's Junius, *133—*137. See ante, § 57. Cave, J., in R. *v.* Thompson, [1893] 2 Q. B. 18, says, in delivering the judgment of the court, "I would add that for my part I always suspect these confessions which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the

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§§ 862, 863. sometimes necessarily called in cases of secret and atrocious crime,—all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in civil actions, it would have been received. The weighty observation of Mr. Justice Foster should also be kept in mind, that "this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted." [1]

§ 863. In addition to these sources of distrust, which are often sufficient to raise a serious doubt whether the confession given in evidence was actually made by the prisoner in the words, or to the effect, stated by the witnesses, there is yet another reason why caution should be employed in receiving and weighing confessions. The statements, though made as deposed to, may be *false*. The prisoner, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession; [2] and the same result may have arisen from a

proof of the prisoner's guilt is otherwise clear and satisfactory, but when it is not the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession—a desire which vanishes as soon as he appears in a court of justice."

[1] Fost. C. L. 243. See, also, 1 Ph. Ev. 307; Lench *v.* Lench, 1805, 10 Ves. 518; Smith *v.* Burnham, 1838, 3 Sumn. 438 (Am.); R. *v.* Crossfield, 1796, 26 How. St. Tr. 109, per Mr. Adams, in his address to the jury. The civilians placed little reliance on naked confessions of guilt, not corroborated by other testimony. Carpzovius, after citing the opinion of Severus to that effect, and enumerating the various kinds of misery which tempt its wretched victims to this mode of suicide, adds—"quorum omnium ex his fontibus contra se emissa pronunciatio, non tam delicti confessione firmati quam vox *doloris*, vel *insanientis* oratio est": Carpz. Pract. Rer. Cr. Pars. III. Quæst. 114, p. 160. So, also, in the Eccles. Courts it is regarded with great distrust. See per Sir W. Scott, in Williams *v.* Williams, 1798, 1 Hagg. Cons. 304.

[2] In Greenleaf on Evidence, 15th edit., 1892, p. 290, various cases and dicta are cited of confessions which were false, and thus show the need of extreme caution as to accepting all confessions. Among other instances quoted is the remarkable case of the two Boorns (Am.), convicted in the Supr. Court of Vermont in September, 1819, of the murder of Russell Colvin, May 10th, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of weak mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a violent blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered, which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but, in 1819, one of the neighbours, having repeatedly dreamed of the murder, with great

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morbid ambition to obtain an infamous notoriety,[1] from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connexions, and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade,[2] or even from the delusion of an overwrought and fantastic imagination.[3]

§ 864. Still, the actual instances of *false* confessions of crime are very rare, and[4] their just value has been happily stated by one of the most accomplished of modern jurists. "Whilst such anomalous cases," says the writer, "ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately

minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin and a button of his clothes were found in an old open cellar in the same field, and in a hollow stump not many rods from it were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, the prisoners were convicted and sentenced to die. On the same day they applied to the Legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends that, as they would certainly be convicted upon the circumstances proved, their only chance of life, by commutation of punishment, depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. This case, of which there is a Report in the Law Library of Harvard University, is critically examined in a learned article in the North Amer. Rev. vol. x. pp. 418—429. For another case of false confession, under a promise of pardon, see a case cited in note to Warickshall's case, 1783, 1 Lea, 263.

[1] One or other of these motives probably induced Hubert falsely to confess that he set fire to London in 1666. His confession cost him his life. See 6 How. St. Tr. 807—809, 819—821; and Wills, Cir. Ev. 70—75. See, also, General Lee's assertion that he was the author of Junius, as narrated in 1 Woodfall's Junius, *122, *123.

[2] Mr. Joy mentions the case of an innocent person making a false constructive confession, in order to fix suspicion on himself alone, that his guilty brothers might have time to escape,—a stratagem which was completely successful; after which he proved an alibi in the most satisfactory manner. Joy on Conf. (Ir.) 107; 1 Chit. Cr. L. 85, S. C.

[3] This is probably the true key to the frequent confessions of the poor wretches in old times tried for witchcraft. See Mary Smith's case, 1616, 2 How. St. Tr 1049; Essex witches, 1645. 4 How. St. Tr. 817; Suffolk witches, 1665, 6 How. St. Tr. 647; Devon witches tried in 1682, 8 How. St. Tr. 1017.

[4] Gr. Ev. § 214, n. 2.

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§§ 864—866. all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such a use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of court and jury."[1]

§ 865.[2] Indeed, all reflecting men are now generally agreed, that *deliberate and voluntary confessions of guilt, if clearly proved,* are among the most effectual proofs in the law; their value depending on the sound presumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.[3] The degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.

§ 866.[4] Confessions may be divided into two classes, namely, *judicial* and *extra-judicial. Judicial confessions* are those which are made before the magistrate, or in court, in the due course of legal proceedings; and it s essential that they be made of the free will of the party, and with full knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by magistrates pursuant to statute; and the plea of guilty to an indictment, made in open court. Either of these is sufficient by itself to support a conviction, though followed by a sentence of death they both being deliberately and solemnly made under the protecting caution and oversight of the judge. Even on trials for treason or misprision of treason, where the law in its clemency affords to the accused unusual protection, a "willing confession without violence in open court," renders it unnecessary to call witnesses in support of the charge;[5] and, perhaps, also,—though this would seem to be highly questionable,[6]—a confession made during the solmnity

[1] 1 Hoffman on Leg. Study, p. 367. 2 Poth. Obl. App. Numb. xvi. § 13.

[2] Gr. Ev. § 215, in part.

[3] Warickshall's case, 1783, 1 Lea. 263; Lambe's case, 1791, 2 Lea. 554; Mortimer *v.* Mortimer, 1820, 2 Hagg. Cons. 315; Harris *v.* Harris, 1829, 2 Hagg. Ecc. 409; 1 Gilb. Ev. 216; Dig. lib. 42, tit. 2, de Confess.; Van Leeuw. Comm. b. v. ch. xxi. § 1;

[4] Gr. Ev. § 216, as to first twelve lines.

[5] 7 W. 3, c. 3 ("The Treason Act, 1695"), § 2; extended to Ireland by 1 & 2 G. 4, c. 24; Gregg's case, 1708, 14 How. St. Tr. 1375.

[6] Berwick's case, 1746, 18 How. St. Tr. 370; R. *v.* Willis, 1710, 15

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§§ 866—868.

of an examination before a magistrate or other person having authority to take it, will, if satisfactorily proved by two witnesses, be deemed sufficient evidence to warrant a conviction.[1] The canon law, too,—scrupulous as it is on the subject of evidence,—regards a *judicial* and free confession, made out of prison, and without any just fear or danger, as amounting, in the phrase of the Spiritual Courts, to a plena probatio.[2] The doctrine of the Roman law, was also to the like effect,— *confessos in jure pro judicatis haberi placet*;—and, indeed, it may be deemed a rule of universal jurisprudence.[3]

§ 867.[4] *Extra-judicial confessions* are those which are made by the party elsewhere than before a magistrate, or in court; this term embracing not only *express* confessions of crime, but all those admissions and acts of the accused from which guilt may be *implied*. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts; and this, too, on trials for treason or misprision of treason, in like manner as on ordinary indictments; except only that, on these more serious occasions, they will not supply the want of the two witnesses, whose testimony is required by the Act of William the Third. Consequently, confessions, whether proved by one witness or two, can only be treated as *corroborative* evidence of the *overt* act charged;[5] unless such overt act be the assassination of the Sovereign, or any attempt to injure his person, in which event the accused may be convicted on the same evidence as an ordinary murderer.[6]

§ 868.[7] Whether, on ordinary indictments for felony or misdemeanor, *extra-judicial confessions, uncorroborated* by any other proof of the corpus delicti,[8] are of themselves, in general, sufficient to justify a conviction of a prisoner, has been gravely

How. St. Tr. 624 (Ward, C.B., and Eyre, S.-G.).

[1] Fost. C. L. 240—243.

[2] Ayliffe Par. 545.

[3] Cod. Lib. 7, tit. 59; 1 Poth. Obl. pt. iv. ch. 3, § 1, num. 798; Van Leeuw. Comm. b. 5, ch. 21, § 2; 1 Masc. de Prob. Conc. 344.

[4] Gr. Ev. § 216, as to first five lines.

[5] R. *v.* Willis, 1710, 15 How. St. Tr. 623; Fost. C. L. 240—243; R. *v.* Crossfield, 1796, 26 How. St. Tr. 55.

[6] 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1.

[7] Gr. Ev. § 217, in part.

[8] As to when the corpus delicti need not be proved, see ante, § 141. See, also, R. *v.* Unkles, 1873, Ir. R. 8 C. L. 50.

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§§ 868, 869.

doubted.[1] In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstances will be found.[2] One case,[3] indeed, seems to be an exception; but it is far too briefly reported to be relied on as an authority.[4] In the United States, a prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient to warrant his conviction,[5] and this opinion certainly accords with the humanity of the criminal law, with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and is countenanced by approved writers on this branch of the law.[6]

§ 869. However, in the Divorce Division a decree for dissolution

[1] In Roman law, such naked confessions amounted only to a semiplena probatio, upon which alone no judgment could be founded; and, at most, the accused, in particular cases, could only be put to the torture. But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence, and persisted in, they were received as plenary proof: Everh. Concl. xix. 8, lxxii. 5, cxxxi. 1, clxiv. 1, 2, 3, clxxxvi. 2, 3, 11; 1 Masc. de Prob. Concl. 347, 349; Van Leeuw. Comm. b. 5, ch. 21, §§ 4, 5; Carpz. Pract. Rer. Cr. Pars. II. Quæst. 60, n. 8.

[2] Thus, for example, in R. *v.* Eldridge, 1821, R. & R. 440, the prisoner, who confessed, was indicted for horse-stealing; the horse was found in his possession, and he had sold it for 12*l.*, after asking 35*l.*, which was its fair value. In another case (R. *v.* Falkner and Bond, 1822, R. & R. 481), the person robbed was called upon his recognizance, and it was proved that one of the prisoners, who confessed, had endeavoured to send a message to him to keep him from appearing. In yet another case (R. *v.* White, 1823, R. & R. 508), there was strong circumstantial evidence both of the larceny from the prosecutor's stable, and of the prisoner's guilt; and in the case of another prisoner (R. *v.* Tippet, 1823, R. & R. 509), who was indicted for the same larceny, part of this evidence was also given, together with the additional proof that such prisoner was an under-ostler in the same stable. In all these cases, too, except in that secondly cited (R. *v.* Falkner and Bond, 1822, R. & R. 481), the confessions were solemnly made before the examining magistrate, and taken down in due form of law; and in the case which forms the exception (R. *v.* Falkner and Bond, 1822, R. & R. 481), the confessions were repeated, once to the officer who apprehended the prisoners, and again on hearing the depositions read over which contained the charge. In another case, which is contained in a very brief note (Stone's case, 1561, Dyer, 215, pl. 50), it does not appear that the corpus delicti was not otherwise proved; on the contrary, the natural inference from the report is, that it was. See, also, R. *v.* Sutcliffe, 1850, 4 Cox, C. C. 270.

[3] R. *v.* Wheeling, 1789, 1 Lea. 311.

[4] The report merely states that, "in the case of John Wheeling, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence."

[5] Greenleaf on Evidence, 14th (or 1892) edit., citing various American authorities.

[6] See Guild's case, 1828, 5 Halst. 168, 185 (Am.); Long's case, 1797, 1 Hayw. 524 (455) (Am.); and R. *v.* Edgar, 1831, cited 2 Russ. C. & M. 255, 826, n. *b*; and see, also, 4 Hawk. P. C. 425.

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of marriage *can*, as we have seen,[1] legally rest on the respondent's admission of adultery, though unsupported by any confirmatory evidence.

§ 870.[2] In the proof of confessions,—as in the case of admissions in civil causes,[3]—*the whole of what the prisoner said* on the subject, at the time of making the confession, should be taken together. It is not reasonable to assume, that the entire proposition respecting the prisoner's connection with the crime, with all its limitations, was contained in one sentence, or in any particular number of sentences. As the meaning of a writing must, in civil cases, be collected from the whole taken together and as, when several instruments relating to the same matter have been executed at one time, they are all resorted to for the purpose of ascertaining the intention of the parties, so here, if one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; or at least so much as is explanatory of the part already proved, and perhaps, in favorem vitæ, all that was relative to the subject-matter in issue.[4] For, as already observed respecting admissions,[5] unless the whole is considered, the true meaning of the part which is evidence against the prisoner cannot be ascertained.

§ 871. But if, after the entire statement of a prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another.[6] Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing.[7] If what he said in his own favour is not contradicted by evidence

[1] Ante, § 768.
[2] Gr. Ev. § 218, in great part.
[3] Ante, §§ 725—734.
[4] Per Ld. C. J. Abbott in the Queen's case, 1820, 2 B. & B. 287 (H. L.); as qualified by the court in Prince *v.* Samo, 1838, 7 L. J. Q. B. 123; R. *v.* Jones, 1827, 2 C. & P. 629; R. *v.* Higgins, 1829, 3 C. & P. 603.
[5] Ante, §§ 725—729, and cases there cited.
[6] R. *v.* Jones, 1827, 2 C. & P. 629.
[7] R. *v.* Higgins, 1829, 3 C. & P. 603; R. *v.* Steptoe, 1830, 4 C. & P. 397; Resp. *v.* McCarty, 1781, 2 Dall. 86 (Am.).

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§§ 871, 872.

offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case.[1] And if the confession implicate other persons by name, still it must be proved as it was made, not omitting the names; but the judge will instruct the jury, that it is not evidence against anyone but the prisoner who made it.[2]

§ 872.[3] Before any confession can be received in evidence in a criminal case, it must be shown to have been *voluntarily* made; for, "a confession, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."[4] The evidence as to whether the confession has been obtained by the influence of hope or fear, being in its nature preliminary, is,—as we have seen,[5]—addressed to the judge, who will require the prosecutor to show *affirmatively*, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession.[6] The test by which the admissibility of a confession may be decided is laid down by Cave, J.,[7] after considering the authorities as follows. "Is it proved affirmatively that the confession was free and voluntary, *i.e.*, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the

[1] Per Littledale, J., in R. *v.* Clewes, 1830, 4 C. & P. 221.

[2] R. *v.* Hearne, 1830, 4 C. & P. 215; R. *v.* Clewes, 1830, 4 C. & P. 221; R. *v.* Fletcher, 1829, 4 C. & P. 250; R. *v.* Hall, 1833, 1 Lewin, 110; R. *v.* Foster, 1833, 1 Lewin, C. C. 110; R. *v.* Walkley, 1833, 6 C. & P. 175 (Gurney, B., who said it had been much considered by the judges); Parke, J., thought otherwise in Barstow's case, 1831, 1 Lewin, C. C. 110. A striking example of the last proposition stated in the text was contained in the case of Robinson *v.* Robinson and Lane, 1858-9, 27 L. J. P. & M. 91, in which a private diary kept by the wife, describing her intrigues with the co-respondent, was received as a confession against herself, though it was held to be inadmissible as evidence against her paramour.

[3] Gr. Ev. § 219, in part.

[4] Per Eyre, C.B., in Warwickshall's case, 1783, 1 Lea. 263; McNally, Ev. 47; Knapp's case, 1830, 10 Pick. 489 (Am.); Chabbock's case, 1804, 1 Mass. 144 (Am.).

[5] Ante, § 23.

[6] R. *v.* Warringham, 1851, 2 Den. C. C. 447; R. *v.* Thompson, [1893] 2 Q. B. 12.

[7] R. *v.* Thompson, [1893] 2 Q. B 12.

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§§ 872, 873.

inducement has not clearly been removed before the statement was made evidence of, the statement is inadmissible." In order to make this test complete it should be remembered that the inducement must be one of a temporal kind, for hopes which are of a spiritual kind merely are not within the principle which excludes confessions obtained by improper influence.[1] So where a prisoner under fourteen years of age charged with murder was told, "Now kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," a statement made in consequence was held admissible.[2] A statement made in consequence of the following was held admissible. "I am very sorry for you, you ought to have known better. Tell me the truth, whether you did it or not. The defendant replied, 'I am innocent.' Whereupon the other said, 'Don't run your soul into more sin, but tell me the truth.'"[3] So where the mother of a little boy in custody on a criminal charge said to him in the presence of another boy charged and a policeman, "You had better as good boys tell the truth," the confession was held by the Court of Crown Cases Reserved to have been properly admitted.[4] In another case before the same court, where one of the prisoner's employers called him into his private room and said, "I think it right that I should tell you that besides being in the presence of my mother and myself, you are in the presence of two police officers, and I should advise you that to any questions that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue," and then after showing the prisoner a letter he denied writing, said, "Take care, we know more than you think we know," a confession thus made was admitted.[5]

§ 873. Although no definite rule can be framed which shall be an unerring guide in every supposable case, there are some points, both in regard to the *person by whom the promise or threat is made*, and also in regard to the *nature of the inducement* itself, on which the judges have pretty generally agreed, a knowledge

[1] R. *v.* Gilham, 1828, 1 Moo. C. C. 186.
[2] R. *v.* Wild, 1835, 1 Moo. C. C. 452.
[3] R. *v.* Sleeman, 1853, Dears. & Bell, 249.
[4] R. *v.* Reeve, 1872, L. R. 1 C. C. R. 362.
[5] R. *v.* Jarvis, 1867, L. R. 1 C. C. 96.

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§§ 873, 874. of which will materially assist the inquiry, whether any particular confession should be admitted in evidence or rejected. And[1] first, as to *the person by whom the inducement is offered.* Here, it is very clear, that if the promise or threat be made by anyone *having authority* over the prisoner in connection with the prosecution,[2]—as, for instance, by the prosecutor,[3] the master or mistress of the prisoner, when the offence concerns such master or mistress, or by the relations and neighbours of the master and prosecutor,[4] the chairman of the company which is prosecuting him,[5] the constable,[6] or other officer,[7] having him in custody, a searcher of female prisoners who had no other duties or authority in the gaol,[8] a magistrate,[9] or the like,[10]—the confession will be rejected as not being voluntary. The same rule will prevail, though the inducement was not actually offered by the person in authority, if it were held out by *anyone in his presence,* and he by his silence *sanctioned* it.[11]

§ 874. In these cases, as the authority possessed by the persons who make or sanction the inducement is calculated both to animate the prisoner's hopes of favour, on the one hand, and,

[1] Gr. Ev. § 222, in part.

[2] R. *v.* Parratt, 1831, 4 C. & P. 570, which was a confession by a sailor to his captain, who threatened him with prison on a charge of stealing his watch; R. *v.* Thompson, 1783, 1 Lea. C. C. 291; R. *v.* Fleming, 1842, 1 Arm. M. & O. 330 (Ir.).

[3] R. *v.* Cass, 1784, 1 Lea. C. C. 293, n.; R. *v.* Jones, 1809, R. & R. 152; R. *v.* Jenkins, 1822, R. & R. 492.

[4] R. *v.* Rose, 1898, 67 L. J. Q. B. 289; R. *v.* Moore, 1852, 21 L. J. M. C. 199; R. *v.* Warringham, 1851, 2 Den. C. C. 447; R. *v.* Upchurch, 1836, 1 Moo. C. C. 465; R. *v.* Taylor, 1839, 8 C. & P. 734; R. *v.* Hearn, 1841, C. & Marsh. 109; R. *v.* Hewett, 1842, C. & Marsh. 534.

[5] R. *v.* Thompson, [1893] 2 Q. B. 12.

[6] R. *v.* Morton, 1843, 2 M. & Rob. 514; R. *v.* Swatkins, 1831, 4 C. & P. 548; R. *v.* Mills, 1833, 6 C. & P. 146; R. *v.* Shepherd, 1836, 7 C. & P. 579.

[7] In R. *v.* Enoch, 1833, 5 C. & P. 539, Park and Taunton, JJ., rejected a confession, where the prisoner was left in charge of a woman, to whom she confessed. Sed qu., and see R. *v.* Sleeman, 1853, Dears. & Bell, 249; and R. *v.* Vernon, 1872, 12 Cox, C. C. 153.

[8] R. *v.* Windsor, 1861, 4 F. & F. 366.

[9] R. *v.* Drew, 1837, 8 C. & P. 140; R. *v.* Cooper, 1833, 5 C. & P. 533; Guild's case, 1828, 5 Halst. 168 (Am.).

[10] Qu. a surgeon; see R. *v.* Kingston, 1830, 4 C. & P. 387; R. *v.* Garner, 1848, 1 Den. C. C. 329. In this last case the inducement was held out by a surgeon, but in the presence of the prisoner's master. Qu. also, the husband of the prisoner: R. *v.* Laugher, 1846, 2 C. & K. 225.

[11] R. *v.* Pountney, 1836, 7 C. & P. 302; R. *v.* Taylor, 1839, 8 C. & P. 734; R. *v.* Drew, 1837, 8 C. & P. 140; R. *v.* Simpson, 1834, 1 Moo. C. C. 410 (Ir.); R. *v.* Laugher, 1846, 2 C. & K. 225; R. *v.* Hewett, 1842, C. & Marsh. 534; R. *v.* Garner, 1848, 1 Den. 329; R. *v.* Luckhurst, 1853, 23 L. J. M. C. 18.

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on the other, to inspire him with awe, and in some degree to overcome the powers of his mind, the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which the prisoner under these circumstances may be induced to make. Moreover,—and this is a more sensible reason for the rule,—the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners, in the hope of wringing from them a reluctant confession. It has been argued, with apparent reason, that a confession made upon the promises or threats of a person, assuming to act in the capacity of an officer or magistrate, and erroneously believed by the prisoner to possess such authority, ought, upon the above principles, to be excluded; but the point is not known to have received any judicial consideration.

§ 875.[1] Whether a confession *made to a person*, who *having no authority has held out an inducement*, will be receivable, is a question upon which at one time there was considerable doubt.[2] Bosanquet, J., on two occasions, held that the fact of *any* person telling a prisoner that it would be better for him to confess, would *always* exclude any confession made to *that person*;[3] and one or two other cases may perhaps be cited in support of the same view.[4] On the other hand, Patteson, J., is reported to have said, in a more recent case, that, *in the opinion of the judges*, any

[1] Gr. Ev. 223, in part.

[2] R. *v.* Spencer, 1837, 7 C. & P. 776. See, also, R. *v.* Pountney, 1836, 7 C. & P. 302; R. *v.* Gibbons, 1823, 1 C. & P. 98, n.

[3] R. *v.* Dunn, 1831, 4 C. & P. 543; R. *v.* Slaughter, 1831, 4 C. & P. 544, n. In R. *v.* Downing, 1840, Chelmsford Spring Assizes, MS., where a woman was indicted for child-murder, a confession made by her to an elderly woman, who was her neighbour and nurse, and who told her it was better for her to confess, was held by Ld. Abinger to be inadmissible; and his lordship refused to admit evidence of a confession subsequently made to a surgeon. Sed qu.

[4] For instance, R. *v.* Kingston, 1830, 4 C. & P. 387, where Parke and Littledale, JJ., rejected a confession made to a surgeon who had held out an inducement. Perhaps, however, this case may rest on the ground that the surgeon was a person in authority. In R. *v.* Walkley, 1833, 6 C. & P. 175, where evidence of a confession was held inadmissible by Gurney, B., it does not appear whether or not the witness, to whom the statement was made, and who had offered the inducement, was a person in authority; and the same observation applies to the case of R. *v.* Thomas, 1834, 6 C. & P. 353. See, also, Guild's case, 1828, 5 Halst. 168 (Am.); and Knapp's case, 1830, 9 Pick. 496 (Am.).

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§§ 875, 876.

confession is receivable, unless some inducement has been held out by a person in *authority;* and with reference to the particular facts of the case before him, to have added that he would have received in evidence the statement made by the prisoner to an indifferent person, had the inducement been offered by such person alone.[1] In a case argued in 1809 before the judges upon the point being reserved, it was decided that a confession induced by neighbours, who had nothing to do with the case, and officiously interfered and admonished the prisoner to tell the truth and consider his family, was admissible, but it does not appear to be more than a decision on the facts of that particular case.[2] In a more recent case[3] the law upon this point was declared by Baron Parke in delivering the judgment of the Court of Crown Cases Reserved as follows:—"Perhaps it would have been better to have held, when it was determined that the judge was to decide whether the confession was voluntary, that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out, altogether; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat, but a rule has been laid down in different precedents by which we are bound, and that is, if the threat or inducement is held out actively or constructively by a person in authority it cannot be received, however slight the threat or inducement may be . . . if not held out by one in authority it is clearly admissible." In this case the existing authorities upon the point already referred to were considered, and it must be taken to settle the law upon this point.

§ 876. Apart from authority both views would seem to be open to one and the same objection; they endeavour to define, *as a strict rule of law*, what circumstances shall be deemed, *in all cases*, to have unduly influenced the mind of the prisoner in making the confession. Now, although the general rule which has been laid down with reference to inducements offered by persons in authority, is that as such inducements will probably succeed in a large majority of instances, the presumption that

[1] R. *v.* Taylor, 1839, 8 C. & P. 734.

[2] R. *v.* Row, 1809, R. & R. 153.

[3] R. *v.* Moore, 1852, 2 Den. 526.

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they will have this effect must, for the sake of uniformity and precision, be adopted as applicable to them all; yet it by no means follows that the same rule will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind; and, in such cases, the confession, which follows, but which, in fact, is not *consequent on* them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority; in these cases it is difficult to see why the confession made to such private person should not be excluded: the opinion expressed by Baron Parke, moreover, seems more logical than the authorities to which he defers.

§ 877.[1] A promise or threat made by an *indifferent person*, who has officiously interfered without any kind of authority, will, however, it is clear, *never* operate to exclude a confession made to *any other person*, who has not himself sanctioned the inducement.[2] This rule is founded, partly, on the supposition that such inducements will seldom much influence the conduct of the prisoner; but chiefly, on the ground that, were a contrary rule to prevail, it would probably open a wide door to collusive practices, and would certainly go far towards rendering all confessions inadmissible.

§ 878. Where promises or threats have been once used of such a nature as to render a confession inadmissible, all *subsequent* admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which *influenced* the first confession has been *effectually dispelled*.[3]

[1] Gr. Ev. § 223, in part.

[2] R. *v.* Gibbons, 1823, 1 C. & P. 87; R. *v.* Hardwick, 1811, 1 C. & P. 98, n.; R. *v.* Row, 1809, R. & R. 153; R. *v.* Tyler, 1823, 1 C. & P. 129.

[3] Joy on Conf. (Ir.) 69; Guild's case, 1828, 5 Halst. 168 (Am.); R. *v.* Hewett, 1842, C. & Marsh. 534; recognizing Meynell's case, 1834, 2 Lewin, C. C. 122; Sherrington's case, 1838, 2 Lewin, C. C. 123; R. *v.* Cooper, 1833, 5 C. & P. 535; Bell's case, 1800 (Ir.), cited in Joy on Conf. (Ir.)

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§ 878. Where,[1] however, it appears, to the satisfaction of the judge, that the improper *influence was totally done away before* the confession was made, the evidence will be received.[2] For example, where a magistrate told a prisoner that if he was not the actual culprit and would disclose all he knew, he would use his influence to protect him; but on subsequently receiving a letter from the Secretary of State refusing mercy, communicated its contents to the prisoner, it was held that a confession, which the prisoner afterwards made to the coroner, who had also duly cautioned him, was clearly voluntary, and was admissible;[3] and where an accused had been induced by promises of favour to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two magistrates that he must expect death and prepare to meet it, again fully acknowledged his guilt, the latter confession was received in evidence.[4] Indeed, it may be generally laid down, that, though an inducement has been held out by an officer, a prosecutor, or the like, and though a confession has been made in consequence of such inducement, still, if the prisoner be subsequently warned by a person in equal or superior authority, that what he may say will be evidence against himself, or that a confession will be of no benefit to him,—or if he be simply cautioned by the magistrate not to say anything against himself,—any admission of guilt afterwards made, will be received as a voluntary confession;[5] and where the prisoner has been duly cautioned by the magistrate in pursuance of 11 & 12 Vict. c. 42, s. 18, anything then said is evidence against him, though there may have been a previous promise or threat held out.[6] More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority, as a magistrate,

71, and in M'Nally, Ev. (Ir.) 43 (Ld. Kilwarden, C.J., and Carleton, C.J. of C. P.); R. *v.* Rosa Rue, 1876, 13 Cox, C. C. 209; Roberts' case, 1827, 1 Dev. 259 (Am.); R. *v.* Walsh, 1843, Ir. Cir. R. 866.

[1] Gr. Ev. § 221, in part. See R. *v.* Doherty, 1874, 13 Cox, C. C. 23.

[2] See R. *v.* Cheverton, 1862, 2 F. & F. 833.

[3] R. *v.* Clewes, 1830, 4 C. & P. 221. See, also, R. *v.* Dingley, 1845, 1 C. & K. 637.

[4] Guild's case, 1828, 5 Halst. 168 (Am.).

[5] R. *v.* Howes, 1834, 6 C. & P. 404; R. *v.* Lingate, 1815, 1 Ph. Ev. 410; R. *v.* Rosier, 1821, 1 Ph. Ev. 410; R. *v.* Bryan, 1834, Jebb, C. C. 157 (Ir.); Joy on Conf. (Ir.) 72—74. See R. *v.* Richards, 1832, 1 M. & Rob. 177.

[6] R. *v.* Bate, 1871, 11 Cox, C. C. 686.

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§§ 878—881.

and the confession is afterwards made to an inferior officer; because a caution from this latter person might be insufficient to efface the expectation of mercy which had previously been raised in the prisoner's mind.[1]

§ 879. Passing now to the *nature of the inducement*, it may be laid down as a general rule, that in order to exclude a confession, the inducement, whether it assume the shape of a promise, a threat, or mere advice, must relate to the actual charge, and be such as is calculated to influence the prisoner's mind with respect to his escape from the charge. As has already been explained, confession will be received, although induced by *spiritual exhortations*, whether of a clergyman,[2] or of any other person;[3] for such a confession can scarcely be regarded as *untrue;* and the law of England and Ireland,—unlike that which prevails in Scotland,[4] America, and in countries subject to the Roman law,[5]—does not, as will presently be pointed out,[6] regard penitential confessions to a priest in the light of privileged communications. But it is not necessary that at the time when the inducement is held out the charge against the prisoner should have been actually made; for where a man was at that time threatened to be given into custody without any offence being then specified, but the nature of the charge was afterwards stated, and he confessed his guilt, the confession was held not admissible.[7]

§§ 880—881. A promise, too, of some merely *collateral benefit or boon*, as for instance, a promise to give the prisoner some spirits,[8]

[1] R. *v.* Cooper, 1833, 5 C. & P. 535.

[2] R. *v.* Gilham, 1828, 1 Moo. C. C. 186. See also Joy on Conf. (Ir.) 52—56.

[3] R. *v.* Wild, 1835, 1 Moo. C. C. 452; R. *v.* Nute, 1842, 3 Russ. C. & M. 458; recognized in R. *v.* Hewitt, 1842, C. & Marsh. 534; R. *v.* Gibney, 1822, Jebb, C. C. 15 (Ir.); R. *v.* Sleeman, 1853, Dears. & Bell, 249, and cases considered on p. 562.

[4] 2 Alison, Cr. L. of Sc., cited in Joy on Conf. (Ir.), 57, n. *a*, 58.

[5] In the Roman law penitential confessions to the priests are encouraged for the relief of the conscience, and the priest is bound to secrecy by the peril of punishment. "Confessio coram sacerdote in penitentiâ facta non probat in judicio; *qui censetur factu coram Deo,* imo, si sacerdos eam enunciet, incidit in pœnam." 1 Masc. de Prob., Concl. 377. It was lawful, however, for the priest to testify in such cases to the fact, that the party had made such a penitential confession to him as the Church requires, and that he had enjoined penance upon him; and, with the express consent of the penitent, he might lawfully testify to the substance of the confession itself. Id.

[6] Post, §§ 916, 917.

[7] R. *v.* Luckhurst, 1853, 23 L. J. M. C. 18.

[8] R. *v.* Sexton, 1822, cited in

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§§ 880—881.

or to strike off his handcuffs,[1] or to let him see his wife,[2] or perhaps (where she is a female) to abstain from an examination of her person,[3] will not be deemed such an inducement as will authorise the rejection of a confession made in consequence. An inducement held out to a prisoner with reference to one charge will generally not exclude a consequent confession which relates to another;[4] unless the two offences be so blended together as to constitute in reality but one transaction.[5] Where one prisoner after committal said to another prisoner, "I wish you would tell me how you murdered the boy, pray split," and A. replied, "Will you be on your oath not to mention what I tell you?" B. made the oath, and A. then made a statement, the confession was admitted in evidence.[6] A confession made when drunk has been admitted in evidence.[7] A confession has been admitted under the following circumstances. A turnkey promised to post a letter given him by a prisoner, and addressed to the prisoner's father. The letter contained a confession, and the turnkey sent it on to the prosecutor instead of posting it as promised. It was held a voluntary confession, and that the way it came into the prosecutor's possession was immaterial.[8]

A confession was made by a prisoner after a representation to him by a constable in the gaol that his accomplice had been taken into custody, which was not the fact. Afterwards on being called as a witness for the prosecution the prisoner denied

Joy on Conf. (Ir.) 17—19, is to the contrary; but this case (decided by Best, J.) is probably not law. See observations of Mr. Greaves in 2 Russ. C. & M. 827, n. (*k*).

[1] R. *v.* Green, 1834, 6 C. & P. 655.

[2] R. *v.* Lloyd, 1834, 6 C. & P. 393 (Ir.).

[3] R. *v.* Cain, 1839, 1 Craw. & D. C. C. 37. But under precisely these circumstances, two able English judges have declined to admit the evidence. R. *v.* Bowden, 1859 (Martin, B., after consulting Willes, J.), Liverpool Assizes, Dec.; MS. ex relatione, Mr. Ch. Hy. Hopwood.

[4] R. *v.* Warner, 1832, cited 3 Russ. C. & M. 452, 498.

[5] R. *v.* Hearn, 1841, C. & Marsh. 109.

[6] R. *v.* Shaw, 1834, 6 C. & P. 372; Com. *v.* Knapp, 1830, 9 Pick. 507 (Am.).

[7] R. *v.* Spilsbury, 1835, 7 C. & P. 187. The headnote states that even if the constable had made the prisoner drunk in order to obtain the confession, it would still be admissible. There is nothing in the case to justify this conclusion, and it is very doubtful whether evidence so obtained would be admitted. In R. *v.* Sippet, tried at Maidstone Ass. 1839, a confession, made by prisoner while *talking in his sleep*, having been tendered in evidence, Tindal, C.J., doubted its admissibility, and it was withdrawn. MS.

[8] R. *v.* Derrington, 1826, 2 C. & P. 418.

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§§ 880—881.

all knowledge of the case. The confession was admitted as evidence against him when he was afterwards tried for the offence himself.[1] This case is only reported very briefly in a footnote in Starkie on Evidence, p. 13 (3rd ed.), and it is not clear how far the prisoner was actually inclined to make the confession by the false statement. In an American case it has been held that a confession obtained by false pretences and fraud is not voluntary, and not admissible in evidence,[2] and this would certainly seem the safer principle. The mere fact that a prisoner makes a confession with a view and in the hope of being permitted to turn King's evidence is not sufficient to exclude the confession as evidence against him. To exclude the confession it must be shown that a hope of pardon was held out by someone in authority, and that the prisoner acted upon the hope so held out.[3]

A confession made by a prisoner who had read a proclamation by the Government offering a pardon to an accomplice who gave evidence, and induced by it, was excluded.[4] A prisoner who refuses to give evidence after having made a confession with a view of being called as King's evidence, may be tried, and his confession is evidence against him, unless it is excluded upon the grounds above stated. The witness and the prosecutor are relegated to their original positions. If the prosecutor can make out his case by legal evidence, by confession or otherwise, the prisoner must abide by it; but the prisoner cannot be convicted on a confession not voluntary, but made with the inducement of hope or fear.[5] What the accused has been *overheard* muttering to himself, or saying to his wife or to any other person in confidence, is also receivable in evidence;[6] though the wife, solicitor and counsel of the prisoner will not, on grounds that will be presently explained, be themselves allowed to reveal what he

[1] R. *v.* Burley, 1818, 2 Stark. Ev. 13, n. (*z*), afterwards confirmed by all the judges.

[2] Cook *v.* The State, 1893, 40 Am. St. R. 756, where the confession was obtained by untruly telling the prisoner that he had been actually seen to do the criminal act with which he was charged.

[3] R. *v.* Berigan, 1841, Ir. Cir. R. 177; R. *v.* Blackburn, 1853, 6 Cox, C. C. 339; R. *v.* Boswell, 1842, C. & Marsh. 584; R. *v.* McHugh, 1857, 7 Cox, C. C. 483, overruling Hall's cases as reported.

[4] R. *v.* Boswell, supra.

[5] R. *v.* Gillis, 1866, 11 Cox, C. C. 69, after considering R. *v.* Burley, 1818, 2 Stark. Ev. 13, n. (*z*), and R. *v.* Dingley, 1845, 1 C. & K. 637.

[6] R. *v.* Simons, 1834, 6 C. & P. 541.

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§§ 880—882.

has said to them.[1] A voluntary confession, too, is admissible to whomsoever it may have been made, though it does not appear that the prisoner was *warned* that what he said would be used against him, nay, though it appears on the contrary that he was *not* so warned.[2] By the law of this country no person ought to be made to incriminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person to find out whether an offence has been committed or not by him. If there is evidence of an offence a police officer is justified in putting questions to a suspected person to ascertain whether there are reasonable grounds for arresting him.[3] The admissibility of answers to such questions before arrest must depend on the circumstances of each case.[4] The mere fact that the person questioned is not cautioned will not in itself make the evidence inadmissible.[5] But after a prisoner is in custody the police have no right to ask him questions, and an admission or confession so obtained is inadmissible.[6] Where a constable after arresting and cautioning a prisoner questioned him, and read a statement made by a person afterwards called as a witness for the prosecution, what the prisoner said in answer was held inadmissible.[7] Where the prisoner in prison was questioned by a constable for the purpose of inducing her to make admissions her answers were held inadmissible.[8]

§ 882. In most cases it is indeed advisable and proper to caution a prisoner in general terms that any confession he makes will be admissible against him at the trial, and can do him no service.[9] Still, it is not necessary, in general, to do more than

[1] Post, §§ 909—915; R. *v.* Shaw, 1834, 6 C. & P. 372.

[2] R. *v.* Gibney, 1822, Jebb, C. C. 15 (Ir.); R. *v.* Magill, 1799, cited in McNally, Ev. (Ir.) 38; R. *v.* Long, 1833, 6 C. & P. 179; Joy on Conf. (Ir.) 45—48; R. *v.* Lavin, 1843, Ir. Cir. R. 813.

[3] R. *v.* Berriman, 1854, 6 Cox, C. C. 388.

[4] Rogers *v.* Hawkins, 1898, 67 L. J. Q. B. 526.

[5] R. *v.* Millar, 1895, 18 Cox, 54; R. *v.* Goddard, 1896, 60 J. P. 491.

[6] R. *v.* Gavin, 1885, 15 Cox, 656.

[7] R. *v.* Male, 1893, 17 Cox, 689. Approved in Rogers *v.* Hawkins in the Divisional Court. In this case Cave, J., defined the duty of a policeman under these circumstances to be, "To keep his mouth shut and his ears open."

[8] R. *v.* Histed, 1899, 19 Cox, 16 (Hawkins, J.).

[9] R. *v.* Green, 1832, 5 C. & P. 312; R. *v.* Arnold, 1838, 8 C. & P. 622; R. *v.* O'Reilly, 1852, Ir. Cir. R. 718.

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§§ 882—884.

to show that a party receiving a confession left the prisoner at full liberty to act and judge for himself; and though it should appear that immediately before the admission was made the accused was in the custody of another person, the court, unless some reason exists for suspecting collusion, will not compel the prosecutor to call such person as a witness, or to prove that he did not hold out any threat or inducement.[1] In order, however, to free the evidence from all reasonable objection, it will be prudent, especially in important cases, to call any persons in authority, who, shortly before the confession was made, either had the prisoner in custody, or held any conversation with him.[2] Notwithstanding that the law is as stated above, many justices of the peace, both in England and Ireland, are in the habit of *dissuading* the culprit, with more or less earnestness, from disclosing any fact which may tend to establish his guilt. This practice has been condemned by several able judges, as an absurd and improper mode of shutting up one of the most valuable sources of justice and truth.[3]

§ 883.[4] It has been thought that *illegal imprisonment* is calculated to exert such influence upon the mind of the prisoner as to justify the inference that his confessions made during its continuance were not voluntary; and, on one occasion, they appear on this ground to have been rejected.[5] But this doctrine cannot be considered as satisfactorily established.[6]

§ 884. The question remains, what language is sufficient to constitute such inducement or threat. Confessions obtained by such words as these are inadmissible:—"Unless[7] you give me a more satisfactory account, I will take you before a magistrate;"[8] "If you will tell me where my goods are, I will be

[1] R. *v.* Clewes, 1830, 4 C. & P. 221; R. *v.* Swatkins, 1831, 4 C. & P. 548; R. *v.* Gibney, 1822, Jebb, C. C. 15 (Ir.); R. *v.* Courtney, 1840. 2 Crawf. & D. C. C. 63 (Ir.) (Ball, J.); Joy on Conf. (Ir.) 59—61.

[2] See cases cited in last note.

[3] R. *v.* Green, 1832, 5 C. & P. 312; R. *v.* Arnold, 1838, 8 C. & P. 622. In R. *v.* Cart, 1838, Maidstone Sum. Ass. MS., Ld. Denman observed to some constables, who were called as witnesses:—"The distinction is very clear; you are not to suppress the truth, but you are not to take any measures of your own to endeavour to extort it."

[4] Gr. Ev. § 230, almost verbatim.

[5] R. *v.* Ackroyd, 1824, 1 Lewin, C. C. 49.

[6] Compare the law as to admissions made under duress, ante, § 798.

[7] Gr. Ev. § 220, in part.

[8] R. *v.* Thompson, 1783, 1 Lea. C. C. 291; R. *v.* Luckhurst, 1853, 23 L. J. M. C. 18; R. *v.* Richards, 1832,

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§ 884. favourable to you;"[1] "I only want my money, and if you give me that, you may go to the devil;"[2] "If you will not tell all you know about it, of course we can do nothing;"[3] "You are under suspicion of this, and you had better tell all you know;"[4] "The watch has been found, and if you do not tell me who your partner was, I will commit you to prison;"[5] "You had better split, and not suffer for all of them;"[6] or the remark to a third person who it is known will probably communicate to him, "It will be better for so-and-so (naming the prisoner) to speak the truth."[7] Confessions have been rejected in consequence of such expressions as the following having been used:—"It will be better for you to speak the truth;"[8] "The inspector tells me you make housebreaking tools; if so, you had better tell the truth, it will be better for you."[9] "It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it;"[10] "Now, be cautious in the answers you give me to the questions I am going to put to you about this watch."[11] So anxious, indeed, was the court at one time to exclude evidence of confessions, that exhortations not to tell lies, but to *speak the truth*, have been deemed likely to induce a *false* acknowledgment of guilt; and, consequently, admissions made after such exhortations have more than once been rejected.[12] But this paradoxical opinion is now happily exploded.[13] The judges have, however, of late years come to the conclusion that some of the cases of this class have gone

1 M. & Rob. 177, cited as R. *v.* Griffiths, 1832, 3 Russ. C. & M. 456, 463; R. *v.* Walsh, 1843, Ir. Cir. R. 866.

[1] R. *v.* Cass, 1784, 1 Lea. 293, n. (Gould, J.); Boyd *v.* The State, undated, 2 Hamph. 37 (Am.).

[2] R. *v.* Jones, 1809, R. & R. 152.

[3] R. *v.* Partridge, 1836, 7 C. & P. 551. See, also, Guild's case, 1828, 5 Halst. 168 (Am.).

[4] R. *v.* Kingston, 1830, 4 C. & P. 387; R. *v.* Cheverton, 1862, 2 F. & F. 833.

[5] R. *v.* Parratt, 1831, 4 C. & P. 570; R. *v.* Upchurch, 1836, 1 Moo. C. C. 465.

[6] R. *v.* Thomas, 1834, 6 C. & P. 353.

[7] R. *v.* Thompson, [1893] 2 Q. B. 12.

[8] R. *v.* Garner, 1848, 1 Den. C. C. 329.

[9] R. *v.* Fennell, 1881, 7 Q. B. D. 147. See R. *v.* Mansfield, 1881, 14 Cox, C. C. 639.

[10] R. *v.* Mills, 1833, 6 C. & P. 146.

[11] R. *v.* Fleming, 1842, 1 Arm. M. & O. 330 (Ir.).

[12] R. *v.* Shepherd, 1836, 7 C. & P. 579; R. *v.* Enoch, 1833, 5 C. & P. 539; R. *v.* Wood, 1842, Ir. Cir. R. 597; R. *v.* Laugher, 1846, 2 C. & K. 225 (Pollock, C.B.); R. *v.* Bate, 1871, 11 Cox, C. C. 686.

[13] R. *v.* Reeve, 1872, L. R. 1 C. C. 362; R. *v.* Holmes, 1843, 1 C. & Kir. 248; R. *v.* Court, 1836, 7 C. & P. 487; R. *v.* Harris, 1832, 1 Moo. C. C. 338; R. *v.* Baldry, 1852, 2 Den. C. C. 430; R. *v.* Jarvis, 1867, L. R. 1 C. C. 96.

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§§ 884–886.

too far in the direction of mercy, and have accordingly expressly overruled three of them.[1]

§ 885. Where the inducement relates to the charge against the prisoner, and comes from a person in authority, it is *not necessary* that it should be *directly held out to the prisoner himself;* but it will equally have the effect of excluding his confession, if there be good reason to believe that it has come to his knowledge, and has influenced his conduct. For instance, where a superior clerk in the post-office said to the wife of a postman, who was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement;[2] and where, in a case of murder, Government had published a handbill, offering pardon to any one of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices, and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession, it was held that what he said could not be given in evidence.[3] And where prosecutor said to prisoner's brother, "It will be better for him to tell the truth," expecting that the brother would, as he did, communicate to prisoner, a subsequent statement by prisoner was held inadmissible.[4]

§ 886.[5] The rule that the confession must be voluntary, is equally applicable to cases where the prisoner has made a *statement during the preliminary inquiry before the magistrate.* The practice of subjecting the accused to a compulsory examination, and even

[1] R. *v.* Baldry, 1852, 2 Den. C. C. 430. There, a policeman, who had a prisoner in custody on a charge of felony, said to him, "You need not say anything to criminate yourself; what you say will be taken down and used as evidence against you." The court held that a confession subsequently made was admissible, overruling R. *v.* Harris, 1844, 1 Cox, C. C. 106; R. *v.* Drew, 1837, 8 C. & P. 140; and R. *v.* Morton, 1843, 2 M. & Rob. 514; and following R. *v.* Reason, 1872, 12 Cox, C. C. 228; R. *v.* Jones, 1872, 12 Cox, C. C. 241. But some of the Irish judges, nevertheless, appear to be still inclined to follow the former *mala praxis.* R. *v.* Toole, 1857, 26 L. J. M. C. 79.

[2] R. *v.* Harding, 1842, 1 Arm. M. & O. 340.

[3] R. *v.* Boswell, 1842, C. & Marsh. 584. See R. *v.* Dingley, 1845, 1 C. & K. 637, and R. *v.* Blackburn, 1853, 6 Cox, C. C. 339.

[4] R. *v.* Thompson, [1893] 2 Q. B. 12.

[5] Gr. Ev. § 224, in part as to first six lines.

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§§ 886—888. of putting him to the torture, was familiar to the Roman law,[1] and both these modes of proceeding were legal in Scotland so late as the reign of Queen Anne.[2] In England, too, down to the reign of Charles the first,[3] the rack was occasionally employed,[4] and even Lord Coke was prepared to wink at, if not to justify, its use;[5] while Lord Bacon did not hesitate, as Attorney-General, to superintend, in person, the torture of an aged clergyman.[6] But, however, just before the Great Rebellion, and in the year 1628, on the trial of Felton for the murder of the Duke of Buckingham, the judges unanimously resolved, that "no such punishment as torture by the rack was known or allowed by our law;"[7] and no attempt has since been made to revive this atrocious practice.[8]

§ 887. Though torture was thus formally abolished before the middle of the seventeenth century, it was not till after the lapse of many years that the common law doctrine, nemo tenetur prodere seipsum, was fully recognised, or at least was interpreted to mean,—as it does in the present day,—that all confessions should be strictly *voluntary*, as will be apparent to any careful reader of the State trials. The practice of extorting admissions from prisoners still continues on the continent,[9] and certainly is no mean instrument for the discovery of truth, but has long been regarded in this country, and always in America, as savouring of unfairness and oppression.

§ 888. Until the passing of the Criminal Evidence Act, 1898,[10] prisoners were not only not *compellable* but not *competent*

[1] See B. Carpz. Pract. Rer. Cri., Pars. iii., Quæst. 113, per tot.

[2] 7 A. c. 21, s. 5 ("The Treason Act, 1708"), abolished torture in Scotland: 2 M'Douall, Inst. (Sc.) 660. For instances of the application of torture there, see 6 How. St. Tr. 1217—1222, and 10 id. 687, 691, 726—747, 751—758.

[3] Till R. *v.* Felton, 1628, 3 How. St. Tr. 371.

[4] See Campion's case, 1578, cited in R. *v.* Cellier, 1680, 17 How. St. Tr. 1205; Peacham's case, 1615, 2 How. St. Tr. 870.

[5] See Lady Shrewsbury's case, 1612, 2 How. St. Tr. 773.

[6] Peacham's case, 1615, 2 How. St Tr. 870. See the masterly life of Ld. Bacon, in Ld. Campbell's Lives of the Chanc., 2nd vol., 339—341.

[7] R. *v.* Felton, 1628, 3 How. St. Tr. 371.

[8] In R. *v.* Cellier, 1680, 17 How. St. Tr. 1205, Weston, B., told the jury, that no person had suffered torture in England since Campion the Jesuit, put to the rack in the 20th of Elizabeth. But this is a strange mistake.

[9] See the Belgian case of Madame Joniaux at end of 1894 and beginning of 1895, as reported in the Times. See Comments on the case of the Duc de Praslin, in 7 Law Rev. Art. vii.

[10] 61 & 62 V. c. 36. Post, §§ 1372B-72E.

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witnesses in any criminal proceedings in which they were accused. It has, however, always been permissible for the accused to make a statement not on oath, either before the magistrates, or at the trial, and evidence of any such statement before the magistrates, providing the necessary formalities have been complied with, is admissible against the accused at the trial. The First Acts regulating the examination of prisoners before the magistrates were passed in the reign of Philip and Mary.[1] These statutes, the principles of which have been adopted in several of the United States,[2] were followed in England by the Criminal Law Act, 1826, and in Ireland by a corresponding Act.[3]

§ 888A. The statute, however, which now *defines the course of practice* in this country as to statements not on oath made by prisoners before magistrates, is the Indictable Offences Act, 1848.[4] The directions of the Act[5] are that "*after the examination of all the witnesses* on the part of the prosecution as aforesaid shall have been *completed*, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:—'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatsoever you may say will be taken down in writing, and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say

[1] 1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10; extended to Ireland by 10 C. 1, c. 18.

[2] See N. York Cr. Code, Part 4, tit. 3, c. 7, §§ 195—199; Bellinger's case, 1832 (Am.); Elmer's Laws of New Jersey, p. 450, § 6; Laws of Alabama (Toulmin's Dig.), tit. 17, ch. 3, § 2, p. 219; Laws of Tennessee (Carruther's and Nicholson's Dig.), p. 426; N. Carolina Rev. Stat., ch. 35, § 1; Laws of Mississippi (Alden and Von Hoesen's Dig.), c. 70, § 5, p. 532; Laws of Delaware (Rev. Code of 1829), p. 63; Brevard's Laws of S. Carolina, vol. i., p. 460; Laws of Missouri (Revision of 1835), p. 476; Laws of Michigan Territory, p. 215. See, also, Massach. Rev. Stat. ch. 85, § 25; Resp. *v.* McCarty, 1781, 2 Dall. 86 (Am.).

[3] Viz., 7 Geo. 4, c. 64. The corresponding statute in Ireland is 9 Geo. 4, c. 54.

[4] Viz., 11 & 12 V. c. 42. The corresponding statute in Ireland is 14 & 15 V. c. 93. Amended by 52 & 53 V. c. 63. As to evidence by prisoner upon oath under the Criminal Evidence Act, 1898 (61 & 62 V. c. 36), see post, §§ 1372B-72E.

[5] In § 18.

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§ 888a. in answer thereto shall be taken down in writing,[1] and *read over to him*, and shall be *signed* by the said justice, or justices, and be kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned;" that is, "the statement of the accused" shall, together with the other documents in the case, "be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice, who is to preside in such court at the said trial, shall order and appoint;"[2] "and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, *without further proof thereof*, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him on his trial, notwithstanding such promise or threat: Provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession,

[1] The form is given in Sched. N. to the Act. This form is legalised by § 28 of the Act, but is not rendered necessary. It is as follows:—

"——: A. B. stands charged before the undersigned [*one*] of her Majesty's justices of the peace in and for the [*county*] aforesaid, this day of in the year of our Lord , for that he the said A. B., on at [*&c., as in the caption of the depositions*]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;' whereupon the said A.B. saith as follows;

[*Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.*]

"A. B.

"Taken before me at the day and year first above mentioned.

"S. L."

§ 20.

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or other statement of the person accused or charged, *made at any time*, which by law would be admissible as evidence against such person."[1] The provisions of the Irish Act[2] are expressed a little differently, but are, in substance, identical with those contained in the English Act, which are set out above.

§ 889. If the provisions referred to above be read in connection with the Form given in the schedule to the Act,[3] it seems that, to render a prisoner's statement strictly valid as a statutory confession, the following circumstances must all have occurred. The charge must have been read to the accused;[4] all the witnesses must have been examined in his presence,[5] and the depositions read to him after the examinations were completed;[6] he must then, and not till then, be cautioned by the justice; first, generally,[7] and, secondly, as to the inefficacy of any promises or threats which may have been formerly held out to him;[8] his whole statement must next be taken down in his own words;[9] it must then be read to him,[10] and he must be asked for his signature, as the form in the schedule directs, "get him to sign it if he will,"[11] though the Act is silent as to the effect of his refusing to sign it, or even to admit its correctness; the justice must also sign the statement;[12] and this being done, it must be kept with the depositions, and be transmitted, together with them and certain other documents, to the court where the trial is to be had, on or before the opening of such court.[13]

§ 890. Notwithstanding these minute directions, it is not easy

[1] § 18.

[2] 14 & 15 V. c. 93, § 14, clause (n) (amended by 52 & 53 V. c. 63).

[3] Cited in last page, n. [1].

[4] See Sch.

[5] See Sch., and § 17 of the Act, cited ante, § 479.

[6] See § 18.

[7] See § 18. As to the old law, see R. *v.* Green, 1832, 5 C. & P. 312; R. *v.* Arnold, 1838, 8 C. & P. 622.

[8] See first proviso in § 18. This second caution is not absolutely necessary unless it should appear that some inducement or threat had previously been held out to the accused, but it will always be prudent in the magistrate to give it. See R. *v.* Sansome, 1850, 1 Den. 545; 19 L. J. M. C. 143.

[9] See Sch.; and R. *v.* Roche, 1841, C. & Mar. 341; R. *v.* Sexton, 1822, cited Joy on Confession 17-19; R. *v.* Mallett, 1830, cited 2 Russ. C. & M. 867.

[10] See § 18; and 3 Russ. C. & M. 500.

[11] See Sch.; and 3 Russ. C. & M. 504; R. *v.* Lambe, 1791, 2 Lea, 552; R. *v.* Thomas, 1794, 2 Lea, 637; R. *v.* Foster, 1827, 1 Lewin, C. C. 46; R. *v.* Hirst, 1828, 1 Lewin, C. C. 46; R. *v.* Jelicote, 1819, 2 Stark. R. 483; R. *v.* Pressly, 1833, 3 C. & P. 183.

[12] See § 18; and R. *v.* Tarrant, 1833, 6 C. & P. 182.

[13] See §§ 18 and 20

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§§ 890—892. to see how the prisoner on his trial could avail himself of any neglect of them on the part of the justice, whether intentional or otherwise; for the statement transmitted, if headed in the manner pointed out by the schedule, is made evidence against the prisoner on its *mere production*, and without any proof of the mode in which it was taken down, unless it can be shown that the signature of the justice is a forgery. Whether this was the intention of the Legislature may, perhaps, be doubted; but such is the apparent effect of the language employed. It is also clear, from the last proviso which is appended to the 18th section of the Act, that any statement made by the prisoner in the magistrate's presence, before the examinations of the witnesses for the prosecution are all completed, may be proved by parol evidence, and will be admissible against him, even though no caution has been previously given.[1]

§ 891. The judges originally felt some embarrassment in putting an interpretation on these provisions. It has now, however, been decided that when an examination has been transmitted by the committing magistrate in the statutory form, it becomes admissible without further proof.[2]

§ 892. But although a written examination, if it purport to be taken in conformity with the Act, and to be signed by the committing magistrate, is in strictness admissible without proof, it still is advisable in serious cases, as a matter of caution, to call either the justice or the clerk, so that it may clearly appear that the proceedings have been conducted in the proper manner.[3]

[1] See post, § 894, n. [10], and, also, R. *v.* Stripp, 1856, 7 Cox, C. C. 97.

[2] *R. v.* Sansome, 1850, 1 Den. 545. See S. C. as reported in 3 C. & Kir. 332. As reported in 4 Cox, 203, this case overrules earlier dicta of Alderson, B. (in R. *v.* Higson, 1849, 2 C. & K. 769), and of Coleridge, J. (after consultation with Cresswell, J., in R. *v.* Kimber, 1849, 3 Cox, C. C. 223), as to the formalities in cautioning a prisoner, which are required by the Act. In 1 Den. 545, where the same case is reported, the above ruling will not be found: and this is the more remarkable as Mr. Denison was himself counsel in the cause. Parke, B., is stated to have gone so far as to assert that, in his judgment, it would be receivable in evidence, though neither of the cautions was stated to have been given. Too much reliance, however, should not be placed on this last dictum: and until the law is more clearly defined by judicial construction, it certainly will be prudent for committing magistrates not only to adopt the form set out in the schedule to the Act, but to give the prisoner in all cases the second caution (see supra, § 889), as well as the first.

[3] See R. *v.* Pikesley, 1839, 9 C. & P. 124; R. *v.* Wilshaw, 1841, C. & Marsh. 145.

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§§ 892, 893.

Indeed, this course may become actually necessary, if the document has not been drawn out in the form given in the schedule, or if it contains erasures or interlineations which require explanation.[1] If, too, the prisoner has not signed his name or mark to the paper, some witness, who was present at the inquiry, should, in prudence, be forthcoming to speak to its identity, and to prove that it was read over to the accused, and assented to by him.[2] It would further seem to be necessary to the validity of an examination as evidence per se, that it should appear on the face of the document that it was taken while the prisoner was under examination on a charge of felony or misdemeanor, or of suspicion of one of those crimes, and that the justices signing it were acting as justices pursuant to statute.[3] Whether these facts must appear by a separate caption is a point which is not yet determined. The form in the schedule gives a separate caption, but that form, though legalised, is not rendered necessary by the Act;[4] and under the old law, provided the examination was written on the same paper as the depositions, the heading at the commencement was held to apply to all the statements contained in the document.[5] In this respect the rule agreed with that which governs examinations taken under the Poor Law Acts; where it is not necessary,—as was once supposed,[6]—that such examinations should have distinct captions, but it will suffice to state the names of all the witnesses in the first caption.[7]

§ 893. As the admissibility of statutory examinations without proof rests on the presumption that the justices have done their duty, it seems to follow that no evidence can be received tending to *contradict* or *vary* the statements contained in the documents

[1] See R. *v.* Brogan, 1834, 3 Russ. C. & M. 4th ed. 463; R. *v.* Dwyers, 1843, 1 Russ. C. & M. 797. In the last edition (1877) of Russell on Crimes, Prentice omits both Brogan's case and Dwyers', but gives no reason for so doing. The cases named cannot be discovered to have been overruled, and appear founded on good sense.

[2] See R. *v.* Reading, 1836, 7 C. & P. 649; R. *v.* Hearn, 1841, C. & Marsh. 109; R. *v.* Hopes, 1835, 7 C. & P. 136; R. *v.* Haines, 1830, 2 Russ. C. & M. 4th ed. 886. Prentice, in the last edition of Russell, also omits this case, but the omission is liable to the same criticism as those in the last note.

[3] See R. *v.* Tarrant, 1833, 6 C. & P. 182.

[4] § 28 of the Act.

[5] R. *v.* Johnson, 1847, 2 C. & K. 355; R. *v.* Young, 1850, 3 C. & K. 106.

[6] R. *v.* Ratcliffe Culey, 1846, 2 New Sess. Cas. 352.

[7] R. *v.* St. Michael's, Coventry, 1848, 12 Q. B. 96.

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§§ 893, 894.

as returned. This was the law before the Act under discussion was passed,[1] and that Act does not appear to have introduced any change in the practice.[2] Whether this presumption is of so conclusive a character as to exclude all parol evidence, which is tendered with the view of adding to the written examination, is a question of doubt and difficulty; but as the Act renders it incumbent on the justice, not only to reduce to writing so much of the prisoner's examination as may be *material*,[3] but to take down his *whole* statement,[4] it would seem right to hold that he must be presumed to have done this, and that no parol evidence of any additional statement *made at the same time* can be received.[5]

§ 894. If, however, parol evidence of such additional statement be admissible on the part of the prosecution, the prisoner, à fortiori, would seem entitled to pray it in aid of his defence.[6] Whatever may be the rule upon this point, it is clear, from the last proviso, to § 18 of the Act, that[7] a written examination will not exclude parol evidence, either of an extra-judicial confession, previously or subsequently made;[8] or of a statement which has been made before the justice on a former investigation, and not incorporated in the examination returned;[9] or of anything incidentally said by the prisoner while the witnesses were deposing against him, even though it were addressed to the magistrate himself,[10] and no caution had been previously given.[11]

[1] R. *v.* Walter, 1836, 3 Esp. 21; R. *v.* Morse, 1838, 8 C. & P. 605.

[2] R. *v.* Bond, 1850, 19 L. J. M. C. 138.

[3] This was the language of the old law. See 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 3.

[4] See 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 18, and Sch. N., cited ante, § 888.

[5] See, however, Rowland *v.* Ashby, 1825, Ry. & M. 232; R. *v.* Harris, 1832, 1 Moo. C. C. 338; Leach *v.* Simpson, 1839, 5 M. & W. 309.

[6] This view of the law is sanctioned, not only by the case of Venafra *v.* Johnson, 1834, 1 M. & Rob. 316 (Gaselee, J., after consulting judges of C. P.), but also by the authority of Mr. Starkie (3 St. Ev. 787) and Mr. Phillipps (2 Ph. Ev. 82—88).

[7] Gr. Ev. § 227, in part.

[8] R. *v.* Carty, 1797, cited in Joy on Conf. 97 (Ir.), and McNally, Ev. 45 (Ir.); R. *v.* Reason, 1722, 16 How. St. Tr. 1.

[9] R. *v.* Wilkinson, 1838, 8 C. & P. 662; R. *v.* Bond, 1850, 19 L. J. M. C. 138.

[10] R. *v.* Taylor, 1874, 13 Cox, C. C. 77 (Brett, J.); R. *v.* Bond, 1850, 19 L. J. M. C. 138; R. *v.* Spilsbury, 1835, 7 C. & P. 187; R. *v.* Johnson, 1829, 2 C. & K. 355; R. *v.* Moore, 1831, cited 3 Russ. C. & M. 509; R. *v.* Hooper, 1842; all cited in 2 Russ. C. & M. 879. But see R. *v.* Weller, 1846, 2 C. & K. 223. Sed qu. as to this case.

[11] R. *v.* Stripp, 1856, 7 Cox, C. C. 97.

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§§ 894, 895-7.

So, if it can be proved that the prisoner's examination was not reduced to writing, parol evidence of what he said before the magistrates will be received;[1] though the presumption that all things were done as the law requires renders it necessary for the Crown to give clear evidence on this point;[2] and the judges more than once have required that the magistrate or his clerk should be called to prove the negative fact.[3] Again, if the written examination be shown to have been lost,[4] or if it be wholly inadmissible under the statute by reason of irregularity, parol evidence will be received to prove what the prisoner voluntarily disclosed;[5] and in this last event of the examination being rejected for informality, it may still be used, either as a contemporaneous writing, to refresh the memory of the witness who wrote it,[6] or if it be signed by the prisoner, it will be receivable at common law as his confession, the signature being first proved, and it being shown that he knew what it contained.[7]

§ 895–7. Where the examination of a prisoner charged before magistrates with a criminal offence purported to have been given *upon oath*, such examination was at common law not only inadmissible as evidence per se, but parol testimony of the prisoner's statements could not be given.[8] This rule, though established by numerous and consistent authorities, was based on principles of law the policy of which was very questionable;[9] it has, however, now become of little importance, since, by the

[1] R. *v.* Hall, 1790, 1 Lewin, C. C. 110, cited by Grose, J.. in R. *v.* Lamb, 1784, 2 Lea. 559; R. *v.* Huet, 1798, 2 Lea. 821.

[2] R. *v.* Fearshire, 1779, 1 Lea. 202; R. *v.* Jacobs, 1784, 1 Lea. 309; R. *v.* Hinxman, 1791, 1 Lea. 310, and R. *v.* Fisher, 1785, 1 Lea. 310; R. *v.* M'Govern, 1852, 5 Cox, C. C. 506.

[3] R. *v.* Packer, 1829, 3 Russ. C. & M. 505, and R. *v.* Phillips, 1831, 3 Russ. C. & M. 505, both cited 2 Russ. C. & M. 876, n. (*p*); Phillips *v.* Winburn, 1830, 4 C. & P. 273.

[4] R. *v.* Reason, 1722, 16 How. St. Tr. 1.

[5] R *v.* Reed, 1829, M. & M. 403 (Tindal, C. J.).

R. *v.* Layer, 1722, 16 How. St. Tr. 214; R. *v.* Watson, 1851, 3 C. & Kir. 111; R. *v.* Watkins, 1831, 4 C. & P. 550, n.; R. *v.* Tarrant, 1833, 6 C. & P. 182; R. *v.* Pressly, 1833, 3 C. & P. 183; R. *v.* Dewhurst, 1825, 1 Lewin, C. C. 47, and R. *v.* Hirst, 1828, 1 Lewin, C. C. 46; R. *v.* Jones, 1828, Carr. Cr. L. 13; R. *v.* Bell, 1831, 5 C. & P. 162.

[7] See R. *v.* Sansome, 1850, 1 Den. 545.

[8] R. *v.* Smith, 1816, 1 Stark. R. 242; R. *v.* Davis, 1833, 6 C. &. P. 177; R. *v.* Bentley, 1833, 6 C. & P. 148; R. *v.* Rivers, 1835, 7 C. & P. 177; R. *v.* Owen, 1840, 9 C. & P. 238; R. *v.* Pikesley, 1839, 9 C. & P. 124; R. *v.* Wheeley, 1838, 8 C. & P. 250.

[9] See prior edition of this work, §§ 895—6.

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§§ 897—899. Criminal Evidence Act, 1898,[1] every person charged with an offence is now a competent witness for the defence at every stage of the proceedings and his evidence thus given on oath before the magistrates may be put in evidence against him at the trial should he then decline to give evidence.[2]

§ 898. The rule excluding sworn confessions seems to have been strictly confined, at common law, to the case of a statement, made by the party upon oath, while *under examination as a prisoner* respecting the criminal charge.[3] Thus, on an indictment for forging a bill of exchange, depositions of the prisoner, taken on oath before commissioners of bankruptcy, *after* a prisoner has been charged before a magistrate with forging the bill, are admissible against him.[4] Where a bankrupt had been examined before a commissioner touching some matter irrespective of his trade dealings, and had not objected to answer the questions put, his examination was held to be admissible evidence against him on a subsequent criminal charge.[5] Where a trader was indicted for obtaining property on credit, within four months before his liquidation, under the false pretence of dealing in the ordinary way of his trade,[6] his examination taken in liquidation under § 97 of the Bankruptcy Act, 1869,[7] was admitted in evidence against him;[8] and on a charge of arson, depositions made by the prisoner when under examination as a witness respecting the origin of the fire, have been read against him.[9]

§ 899. Similarly, on the trial of an indictment for conspiracy, the answers in Chancery of the defendants, made on oath by

[1] 61 & 62 V. c. 32.

[2] R. *v.* Bird, 1898, 62 J. P. 760; 15 T. L. R. 26.

[3] See Joy on Conf. 62—68 (Ir.). One or two decisions by Gurney, B., might be cited, seeming to extend the rule somewhat further, and to render inadmissible confessions made on oath to magistrates or coroners by parties, who, after being examined *as witnesses*, have themselves been committed for trial (R. *v.* Lewis, 1833, 9 C. & P. 161; R. *v.* Davis, 1833, 6 C. & P. 177; R. *v.* Owen, 1840, 9 C. & P. 238. See, also, R. *v.* M'Hugh, 1857, 7 Cox, C. C. 483 (Ir.) (Pennefather, B., diss.)); but these decisions have been overruled by subsequent cases. (See R. *v.* Gillis, 1866, 11 Cox, C. C. 69 (Ir.); R. *v.* Coote, 1873, L. R. 4 P. C. 605.

[4] R. *v.* Wheater, 1838, 2 Moo. C. C. 45. See R. *v.* Cherry, 1871, 12 Cox, C. C. 32.

[5] R. *v.* Sloggett, 1856, 25 L. J. M. C. 93. See, also, R. *v.* Scott, 1856, 25 L. J. M. C. 128; and R. *v.* Hillam, 1872, 12 Cox, C. C. 174.

[6] Contrary to § 11 of the Debtors Act, 1869 (32 & 33 V. c. 62), amended by 53 & 54 V. c. 71, § 26.

[7] 32 & 33 V. c. 71.

[8] R. *v.* Widdop, 1872, L. R. 2 C. C. 3.

[9] R. *v.* Coote, 1873, L. R. 4 P. C. 605.

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§§ 899, 899a.

them in a suit instituted against them by the prosecutor, have been received.[1] An affidavit sworn by him in a suit in Doctor's Commons has also been given in evidence against a prisoner;[2] and depositions made by prisoners, when examined as witnesses against other persons on criminal charges, have several times been admitted against themselves.[3] Upon a trial for manslaughter, the prisoner's deposition on oath, taken by the coroner upon the inquest is, moreover, evidence against him.[4] So, the testimony, given by a prisoner before a committee of the House of Commons, may be read against him on a criminal trial.[5] A case[6] which is sometimes cited as a decision conflicting with the above proposition, is in fact no hostile authority, as it only determined that on an indictment against a bankrupt for not disclosing his effects under the commission, his balance-sheet, which was only admissible in the event of the commission being valid, could not be given in evidence to prove the petitioning creditor's debt as a part of the commission.[7]

§ 899A. On the whole it seems clear, that if a prisoner, on being examined as a witness, has consented to answer questions, to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes,[8] *unless* he be protected by the special language of some statute.[9] The objection

[1] R. *v.* Goldshede, 1844, 1 C. & K. 651; R. *v.* Highfield, 1828, cited 3 Russ. C. & M. 479.

[2] R. *v.* Walker, 1806 (Ld. Ellenborough), cited (Gurney, B.) in R. *v.* Lewis, 1833, 6 C. & P. 162.

[3] R. *v.* Haworth, 1830, 4 C. & P. 254. In one case the very point stated ante, § 898, note [8], to have been decided by Gurney, B., was distinctly overruled by Cockburn, C.J.; and a deposition was admitted against a prisoner, *who had made it before the justices while under examination as a witness*, and who, in consequence of its self-criminating character, had been committed to take his trial: R. *v.* Chidley and Cummins, 1860, 8 Cox, C. C. 365. See, also, R. *v.* Colmer, 1864, 9 Cox, C. C. 506; R. *v.* Tubby, 1833, 5 C. & P. 530; R. *v.* Braynell, 1850, 4 Cox, C. C. 404.

[4] R. *v.* Bateman, 1866, 4 F. & F. 1068.

[5] R. *v.* Merceron, 1818, 2 Stark. R. 366. This case is, however, of little authority on the subject under discussion, as the evidence could not then have been given on oath. See Ld. Tenterden in R. *v.* Gilham, 1828, 1 Moo. C. C. 186.

[6] R. *v.* Britton, 1833, 1 M. & Rob. 297.

[7] Patteson, J., in R. *v.* Wheater, 1838, 2 Moo. C. C. 45, explaining that decision.

[8] But see R. *v.* Gillis, 1866, 11 Cox, C. C. 69 (Ir.), where a large majority of the Irish judges took a different view of the law. Sed qu.

[9] See post, § 1455, as to these statutes.

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§§ 899a—902. is for the witness to take, and he is presumed to know the law sufficiently to take it.[1]

§ 900. Although, however, a prisoner cannot, at common law, exclude his own confession, on the sole ground that it was made by him while a witness under oath, yet, if he can prove that, when questions tending to criminate him were put, he claimed the protection of the court, and was still compelled to answer, his answers cannot be given in evidence against himself.[2] Testimony so obtained is excluded, not, as it seems, because it may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man shall be forced to criminate himself.[3]

§ 901. The statute prescribing the duties of coroners enacts that every coroner shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall certify and subscribe the same, and deliver it to the officer of the court in which the trial is to be,[4] and it also contains provisions as to the issue of a warrant by the coroner for the arrest of every person charged on an inquisition found before him with murder or manslaughter.[5] On various occasions, too, it has been assumed that a coroner has the same authority to take the examination of a prisoner as a magistrate.[6]

§ 902.[7] When, *in consequence of information obtained from the prisoner in an improper manner, the property* stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, *has been discovered*, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being confirmed by the finding, is shown to be true, and not to

[1] R. *v.* Coote, 1873, L. R. 4 P. C. 599.

[2] R. *v.* Garbett, 1847, 1 Den. C. C. 236. See post, §§ 1453 et seq., as to what questions a witness may refuse to answer.

[3] R. *v.* Garbett, 1847, 1 Den. C. C. 236. But see cases cited in § 898, ante.

[4] 50 & 51 V. c. 71 ("The Coroners Act, 1887"), § 4; 9 G. 4, c. 54, § 4 (cited ante, § 492) and § 6 Ir.

[5] Id. § 5.

[6] R. *v.* Reid, 1829, M. & M. 403; R. *v.* Roche, 1841, C. & Mar. 341; Brogan's case (undated), 2 Russ. C. & M. 874, 4th ed.

[7] Gr. Ev. § 231, in great part.

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have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there.[1] So much of the confession as relates *distinctly* to the fact discovered by it may be given in evidence, since this part of the statement, for the reasons already given, cannot have been false.[2]

§ 903.[3] If, too, a prisoner be persuaded, by improper inducements, to confess, and *to himself deliver up the goods stolen*, his declarations, contemporaneous with and explanatory of the act of delivery, though they may amount to a confession of guilt, will be admissible.[4] But whatever he may have said at the same time, not qualifying or explaining the act of delivery, must be rejected. And if,—notwithstanding the prisoner's confession thus improperly induced, and any acts done in furtherance of the discovery,—*the search* for the property or person in question be *ineffectual*, no proof of either the confession or the acts can be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts done under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct.[5]

§ 904. A prisoner is not liable to be affected by the *confessions of his accomplices*.[6] So strictly is this rule enforced, that where

[1] Ph. Ev. 411; R. *v.* Warickshall, 1783, 1 Lea. C. C. 263; R. *v.* Mosey, 1784, 1 Lea. C. C. 265 n.; R. *v.* Lockhart, 1785, 1 Lea. C. C. 386; R. *v.* Gould, 1840, 9 C. & P. 364; R. *v.* Thurtell, 1822, cited Joy on Conf. 84 (Ir.); R. *v.* Cain, 1839, 1 Craw. & D. C. C. 37 (Ir.); Com. *v.* Knapp, 1830, 9 Pick. 507 (Am.).

[2] R. *v.* Butcher, 1798, 1 Lea. 265 n.; and see the cases cited above, n. [1]. In Harvey's case, 1800, 2 East, P. C. 658, Lord Eldon laid down the rule somewhat more strictly than it is stated in the text, saying that where the knowledge of any *fact* was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But it is submitted that the result of the authorities cited in the preceding and the following note is as stated in the text.

[3] Gr. Ev. § 232, in part.

[4] R. *v.* Griffin, 1809, R. & R. 151; R. *v.* Jones, 1809, R. & R. 152.

[5] R. *v.* Jenkins, 1822, R. & R. 492.

[6] So is the Roman law. "Confessio

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§§ 904, 905. a person is indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, is no evidence of that fact as against the receiver;[1] and it would be the same if both parties were indicted together, and the principal were to plead guilty. Even in cases of conspiracy after the common enterprise is at an end, whether by accomplishment or abandonment, no one is permitted by any subsequent act or declaration of his own to affect the other conspirators. His confession, therefore, subsequently made is only admissible in evidence against himself.[2]

§ 905.[3] On similar grounds, no person is, in general, answerable criminally for the acts of his servants or agents, whether he be the accused or the principal in the matter, unless a criminal design be brought home to such person himself.[4] The act of the agent or servant may be shown in evidence, as proof that such an act was done; for a fact must be established by the same evidence, whether it be followed by a criminal or civil consequence.[5] But it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be affected by the fact when so established. For though the wrongful or fraudulent act of the agent may involve his principal civilly,[6] it cannot convict him of a crime, unless proof be also given that the principal has directed, or, at least, assented, to such act.[7] Where it was proposed to show

unius non probat in præjudicium alterius, quia aliàs esset in manu confitentis dicere quod vellet, et sic jus alteri quæsitum auferre, quando omninò jura prohibent; etiamsi talis confitens esset omni exceptione major. Sed limitabis, quando inter partes convenit parere confessioni et dicto unius alterius." 1 Masc. de Prob., Concl. 486, p. 409. See ante, §§ 593, 594.

[1] R. *v.* Turner, 1832, 1 Moo. C. C. 347 (all the judges).

[2] R. *v.* Turner, 1832, 1 Moo. C. C. 347; R. *v.* Blake, 1844, 6 Q. B. 126; R. *v.* Appleby, 1821, 3 Stark. 33.

[3] Gr. Ev. § 234, in great part.

[4] See Cooper *v.* Slade, 1857–8, 6 H. L. C. 746 (Ld. Wensleydale). But even in criminal cases there are certain exceptions to the general rule: see ante, § 115.

[5] See ante, § 724.

[6] Barwick *v.* Eng. Jt. Stock Bk., 1867, L. R. 2 Ex. 259; Proudfoot *v.* Montefiore, 1867, L. R. 2 Q. B. 511; Moore *v.* Metrop. Rail. Co., 1872, L. R. 8 Q. B. 36; Mackay *v.* Com. Bk. of New Brunswick, 1874, L. R. 5 P. C. 394; Swire *v.* Francis, 1877, 3 App. Cas. 106; Burmah Trading Corp. Lim. *v.* Mirza Mahomed Ally, &c., 1878, L. R. 5 Ind. App. 130 (P. C.). See Ld. Bolinbroke *v.* Local Board of Health of Swindon, 1874, L. R. 9 C. P. 575; Shaw *v.* Port Phillip, &c., 1884, 13 Q. B. D. 103.

[7] Ld. Melville's case, 1806, 29 How. St. Tr. 707; The Queen's case, 1820, 2 B. & B. 287 (H. L.); ante, § 724.

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that an agent of the prosecutor, not called as a witness, had offered a bribe to an intended witness, who, however, had not been called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognised.[1]

§ 906. The rule thus generally laid down is open to an apparent exception in the case of the proprietor of a newspaper, who is, primâ facie, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge.[2] Yet even here the defendant is, by Lord Campbell's Act,[3] now entitled to be acquitted if he prove that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part.

§ 907. The mere fact that an uncontradicted statement is made in the presence of an accused does not make it evidence against him. Such a statement can only be given in evidence against him when the accused himself accepts the statement, and so makes it his own confession. His acceptance may be inferred from his answers, and in some cases from his conduct on hearing the statement. A statement made in the absence of a prisoner cannot be evidence against him. It makes no difference that it was made in his presence, unless evidence is adduced which would justify the jury in finding that the prisoner having heard the statement and having the opportunity of explaining or denying it, and the occasion[4] being one upon which he might reasonably be expected to make some observation, explanation, or denial, by his silence, his conduct or

[1] The Queen's case, 1820, 2 B. & B. 287 (H. L.).

[2] Ld. Tenterden put this strongly (being apparently prepared to make the criminal liability even more than primâ facie) in the following remarks:—"Surely, a person who derives profit from, and furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication." R. *v.* Gutch, 1829, M. & M. 433. See, further, as to the acts of agents, ante, § 115.

[3] 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 7; R. *v.* Holbrook, 1877, 3 Q. B. D. 60; S. C. on second trial, 1878, 4 Q. B. D. 42. See, also, R. *v.* Ramsay, 1883, 15 Cox, C. C. 231.

[4] A statement made in a prisoner's presence, upon a hearing before a magistrate, would not be admissible on this theory: R. *v.* Appleby, 1821, 2 Stark. 33; R. *v.* Summerton, 1842, C. & Marsh. 593.

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§ 907. demeanour, or by the character of any observation or explanation he thought fit to make, substantially admitted the truth of the whole or some portion of it. Whether there is any evidence of this is a question for the judge. If he thinks so he should allow the evidence to go to the jury, and if they come to the conclusion that the prisoner admitted the truth of the whole or any part of it, they may take the statement into consideration, or so much of it as they think admitted, as evidence, not because the statement standing alone is any evidence, but solely because of the prisoner's admission of the truth. Unless the jury find as a fact that there was such admission, the statement is not evidence.[1] In the well-known case of Dr. Newman,[2] on an information for libel, to which truth was pleaded as a justification under Lord Campbell's Act,[3] the defendant tendered evidence to prove that the very imputations in the libel had been previously published in another work, and that the prosecutor, though well aware of this, had taken no steps to obtain redress; but the evidence was rejected as too vague to be any proof of acquiescence.

[1] R. *v.* Smith (Hawkins, J.), 1897, 8 Cox, 471.

[2] R. *v.* Newman, 1853, 22 L.J.Q.B. 156.

[3] 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 7.

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PART IV.

EVIDENCE SUBJECT TO SPECIAL RULES OF LAW.

CHAPTER I.

EVIDENCE EXCLUDED ON GROUNDS OF PUBLIC POLICY.

§§ 908—909a.

§ 908.[1] THE law *excludes* or dispenses with some kinds of evidence *on grounds of public policy:* because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from wholly rejecting them. Our attention must now be directed to it so far as it applies to the matter concerning which the witness is interrogated.

§ 909. The rule has reference to either (*a*) persons,[2] or (*b*) matters. The *matters* which the law says shall not be the subject of evidence in a Court of Justice are: (1) Communications which have passed between husband and wife during marriage; (2) disclosures by such adviser of communications which have been made by a man to his legal adviser; (3) evidence by judges or jurymen as to matters which have taken place while they were engaged *judicially;* (4) State secrets; and (5) matters of which decency forbids the disclosure.

§ 909A. The *first class* of subjects protected from disclosure consists of *communications* between *husband and wife.* "No husband," says the Legislature, "shall be *compellable*[3] to

[1] Gr. Ev. § 236, in part.

[2] So far as the rule relates to *the persons* testifying, it will be hereafter discussed in the chapter relating to the competency of witnesses, post, Part v. Ch. ii.

[3] In America it has been decided that, so far as such statute is concerned, a *voluntary* statement is admissible. See Southwick *v.* Southwick, 1870, 2 Sweeney, 234 (Am.). But see infra, as to whether at common law one of the parties can, without his or her consent, testify against the other as to communications which passed between them during the marriage.

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§§ 909a, 910.

disclose any communication made to him by his wife during the marriage, and no wife shall be *compellable*[1] to disclose any communication made to her by her husband during the marriage."[2] This enactment rests on the obvious ground, that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all* communications of whatever nature which pass between husband and wife.[3] It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated "during the marriage." Consequently, if a man were to make the most confidential statement to a woman *before* he married her, and she were subsequently called as a witness in a civil suit, and interrogated with respect to the communication, she would, it seems, be bound to disclose what she knew of the matter.

§ 910. It has not been settled in England to what communications made during marriage the privilege extends. In America it has been held only to extend to matters incident to the conjugal relation or to knowledge obtained by reason thereof;[4] to all that passes between husband and wife when alone, or when only children of tender years are present; to conversations between husband and wife which have been *overheard* by a third person,[5] but not to information which has come to either of the

[1] See last note.

[2] 16 & 17 V. c. 83, § 3; and this is so when the husband or wife is called as a witness under the Criminal Evidence Act, 1898 (61 & 62 V. c. 36). See § 1 (d).

[3] See O'Connor *v.* Marjoribanks, 1842, 11 L. J. C. P. 267.

[4] See Commonwealth *v.* Sapp, 1890, 29 Am. St. R. 405, where the whole subject is considered. But a letter, written by an accused, while in prison, to his wife, and voluntarily given up by her, was treated as a confidential communication between a husband and wife, and therefore not admitted in evidence against the husband. See Scott *v.* Commonwealth, 1893, 42 Am. St. R. 371. There is some authority in English law for a similar view: see R. *v.* Pamenter, 1872, 12 Cox, C. C. 177, cited ante, § 881 n.

[5] Com. *v.* Griffin, 1872, 110 Mass. 181; State *v.* Center (Am.), 1862, 35 Verm. 378, cited Greenleaf on Ev. 15th edit. (1892), note to § 254.

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parties quite independently of the marriage relationship.[1] A married person is always, both in England and America, a competent witness to prove acts alleged by him or her to have been done by the other party to the marriage in violation of the complainant's person or liberty.[1]

§ 910A. A question may arise as to whether or not the relation of husband and wife must be *still subsisting* at the time when the evidence is required. On the one hand the statute speaks only of husbands and wives, and makes no reference either to widowers or widows, or to parties who have been divorced; but on the other hand, the old common law rule, which precluded husbands and wives from giving evidence for or against each other, has been construed by the judges to mean, that whatever had come to the knowledge of either party by means of the hallowed confidence which marriage inspires, could not be afterwards divulged in testimony, even though the other party were no longer living.[2] Accordingly, when a woman, divorced by Act of Parliament, and married to another person, was offered as a witness against her former husband, she was held clearly incompetent, the judge adding, "It never can be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."[3]

§ 911.[4] Secondly, as regards *professional communications*, the rule is now well settled that, where a *barrister* or *solicitor* is professionally employed by a client, all communications between them in the course and for the purpose of that employment, are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title deeds, wills,[5] documents, or other papers delivered,

[1] See note [4], p. 642.

[2] O'Connor *v.* Marjoribanks, 1842, 11 L. J. C. P. 267; overruling Beveridge *v.* Minter, 1824, 1 C. & P. 364, and confirming Monro *v.* Twistleton, 1802, Pea. Add. Cas. 221. See, also, Doker *v.* Hasler, 1824, Ry. & M. 198.

[3] Monroe *v.* Twistleton, 1802, Pea. Add. Cas. 221; explained and confirmed in Aveson *v.* Ld. Kinnaird, 1805, 6 East, 192; Commonwealth *v.* Sapp, 1890, 29 Am. St. R. 405, ubi supra.

[4] Gr. Ev. § 237, slightly.

[5] Doe *v.* James, 1837, 2 M. & Rob. 47. There, a party claiming as devisee under a will, his solicitor was upheld in refusing to produce a will which had come into his hands in a professional capacity, though it was suggested that it related also to personalty, and ought, therefore, to be

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§§ 911, 912.

or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity,[1] and this even though third persons were present at them.[2] Of course, cases laid before counsel on behalf of a client, and their opinions thereon, stand upon precisely the same footing as other professional communications from client to either counsel or solicitor, or from either counsel or solicitor to client.[3] The privilege is the privilege of the client and not of the professional adviser,[4] the adviser, therefore, is bound to claim the privilege unless the client has waived it,[5] which it is open for him to do.[6]

§ 912. This rule equally applies, though the solicitor be employed in the character either of a scrivener to raise money,[7] or of a *conveyancer* to draw deeds of conveyance;[8] or though the conversation relate only to the sale of an estate, and to the amount of the bidding to be reserved.[9] In fact it extends to all communications between a solicitor and his client, relating to matters within the ordinary scope of a solicitor's duty.[10] But the legal adviser can be asked whether the conference between him and his client was for a lawful or an unlawful purpose.[11] If either from his admission or from independent evidence it clearly appears that the communication was made by the client for a fraudulent or criminal purpose,—as, for instance, if the solicitor

deposited in the Eccles. Court, and to be open for public inspection.

[1] Herring *v.* Clobery, 1842, 1 Phill. 91; Cromack *v.* Heathcote, 1820, 2 B. & B. 4; Greenough *v.* Gaskell, 1833, 1 My. & K. 100, where Brougham, C., was assisted by Ld. Lyndhurst, Tindal, C.J., and Parke, J. See Moore *v.* Terrell, 1833, 4 B. & Ad. 870. Ld. Abinger also mentions the case as reviewing all the authorities. See Turquand *v.* Knight, 1836, 6 L. J. Ex. 4. See, also, Chant *v.* Brown, 1851-2, 9 Hare, 790.

[2] Blount *v.* Kimpton, 1892, 31 Am. St. R. 554. But the third party may give evidence as to them: Hurlburt *v.* Hurlburt, 1891, 26 Am. St. R. 482.

[3] Pearse *v.* Pearse, 1846, 16 L. J. Ch. 153; Jenkins *v.* Bushby, 1866, 35 L. J. Ch. 400. See Bargaddie Coal Co. *v.* Wark, 1859, 3 Macq. 468 (H. L.).

[4] Anderson *v.* Bank of Columbia, 1876, 2 C. D. (Jessel, M.R.), at p. 649.

[5] Procter *v.* Smiles, 1886, 55 L. J. Q. B. 527.

[6] Calcraft *v.* Guest, [1898] 1 Q. B. (Lindley, M.R.), at p. 761; Goldstone *v.* Williams, [1899] 1 Ch. (Stirling, J.), at p. 52.

[7] Turquand *v.* Knight, 1836, 6 L. J. Ex. 4; Harvey *v.* Clayton, 1675, 2 Swans. 221 n.; Anon., 1693, Skin. 404 (Ld. Holt). But here it is necessary that the solicitor should have been consulted as the party's own legal adviser: R. *v.* Farley, 1846, 2 C. & K. 313. See post, § 923, ad fin.

[8] Cromack *v.* Heathcote, 1820, 2 B. & B. 4.

[9] Carpmael *v.* Powis, 1845-6, 15 L. J. Ch. 275.

[10] Id. (Ld. Lyndhurst).

[11] Reg. *v.* Cox and Railton, 1884, 14 Q. B. D. 153 (C. C. R.); overruling Doe *v.* Harris, 1833, 5 C. & P. 592; R. *v.* Farley, 1846, 2 C. & K. 313.

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was questioned as to the most skilful mode of effecting a fraud, or committing an indictable offence, or apparently, even if there is a definite charge that the solicitor had been consulted for an illegal purpose,[1] the privilege does not exist, and he is bound to disclose such guilty project.[2] The existence of an illegal purpose, it is now clearly settled, prevents the privilege from attaching; for it is not the duty of a solicitor to advise his client how to break the law, or to contrive a fraud.[3] An allegation that the solicitor was consulted as to a mode to "evade" the payment of duty under a Revenue Act is not a sufficiently definite charge of fraud or illegality to avoid the privilege.[4] The mere name of the client, moreover, is not the subject of privilege.[5]

§ 913. Where the *professional adviser is the party interrogated*, it is quite immaterial whether the communication relate to any litigation commenced or anticipated.[6] As Brougham, L.C., observed, "If[7] the privilege were confined to communications connected with suits begun or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. * * * If, touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client or on his account and for his benefit in the transaction of his business,—or, which amounts to the same thing, if

[1] Bullivant *v.* Att.-Gen. for Victoria, [1901] A. C. 196; Williams *v.* Quebrada Ry., &c., Co., [1895] 2 Ch. 751 (Kekewich, J.).

[2] R. *v.* Cox and Railton, supra; R. *v.* Avery, 1838, 8 C. & P. 596; Follett *v.* Jefferyes, 1850, 20 L. J. Ch. 65, cited post, note to § 930; Mornington *v.* Mornington, 1861, 2 J. & H. 697; Charlton *v.* Coombes, 1863 (Stuart, V.-C.); Annesley *v.* Ld. Anglesea, 1743, 17 How. St. Tr. 1430 (Ir.); and post, § 936. See, also, Gartside *v.* Outram, 1856, 26 L. J. Ch. 115; and post, § 929.

[3] Reg. *v.* Cox and Railton, supra; Russell *v.* Jackson, 1851, 21 L. J. Ch. 146. See, also, Kelly *v.* Jackson, 1849, 13 Ir. Eq. R. 129.

[4] Bullivant *v.* Att.-Gen. for Victoria, supra.

[5] Bursill *v.* Tanner, 1885, 16 Q. B. D. 1; Ex parte Campbell, In re Cathcart, 1870, L. R. 5 Ch. 703.

[6] Ld. Walsingham *v.* Goodricke, 1843, 3 Hare, 124; Desborough *v.* Rawlins, 1838, 7 L. J. Ch. 171; Pearse *v.* Pearse, 1846, 16 L. J. Ch. 153; Sawyer *v.* Birchmore, 1835, 3 My. & K. 572; Herring *v.* Clobery, 1842, 1 Phill. 91; Jones *v.* Pugh, 1842, 1 Phill. 96; Greenough *v.* Gaskell, 1833, 1 My. & K. 98; Carpmael *v.* Powis, 1845-6, 15 L. J. Ch. 275. These cases overrule Williams *v.* Mudie, 1824, 1 C. & P. 158; Clark *v.* Clark, 1830, 1 M. & Rob. 3; Broad *v.* Pitt, 1828, 3 C. & P. 518; and Wadsworth *v.* Hamshaw, 1819, 2 B. & B. 5 n.

[7] Gr. Ev. §§ 240 and 237.

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§§ 913—915. they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client,—they are not only justified in withholding such matters, but *bound to withhold* them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."[1]

§ 914.[2] "The *foundation* of this rule," his lordship also explains, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings."[3] The same learned judge remarked in another case, that if such communications were not protected, no man would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself.[4]

§ 915. The rigid enforcement of the rule no doubt occasionally operates to the exclusion of truth; but if any law-reformer feels inclined to condemn it on this ground, he may be reminded of the language of the late Knight Bruce, L.J., who observed:— "Truth, like all other good things, may be loved unwisely,—may

[1] Greenough *v.* Gaskell, 1833, 1 My. & K. 98.

[2] Gr. Ev. § 238, verbatim.

[3] Greenough *v.* Gaskell, 1833, 1 My. & K. 98; quoted with approbation in Russell *v.* Jackson, 1851, 21 L. J. Ch. 146.

[4] Bolton *v.* Corp. of Liverpool, 1833, 1 L. J. Ch. 166. "This rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In Ex parte Aitken, 1820, 4 B. & Ald. 49, that rule is laid down thus:— 'Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, then the court will exercise this jurisdiction.' See, also, Ex parte Yeatman, 1835. So where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." Turquand *v.* Knight, 1836, 6 L. J. Ex. 4. The Roman law was similar to ours, though the reasons were different. 1 Mas. de Prob., Concl. 66; vol. 3, Concl. 1239; Farin. Op., Tom. 2, Tit. 6, Quæst. 63, Illat. 5, 6.

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be pursued too keenly,—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."[1]

§ 916. Such being the reasons for which communications to legal advisers are privileged, the privilege—though perhaps the policy of such restriction is questionable[2]—does not extend to matters communicated to *other* persons, though made under terms of the closest secrecy.[3] Thus,[4] medical men[5] and clergymen[6] are bound to disclose any information which, by acting in

[1] Pearse *v.* Pearse, 1846, 16 L. J. Ch. 153.

[2] In Wilson *v.* Rastall, 1792, 4 T. R. 460, Buller, J., much regretted that privilege was not extended to cases in which medical persons acquired information by attending in their professional characters. In Greenough *v.* Gaskell, 1833, 1 My. & K. 103, Ld. Brougham, while stating that the rule was limited to legal advisers, observed, that "certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers." In many of the American States statutes have been passed by which communications to medical men and to ministers of religion are made privileged, or may not be disclosed. As to these, and for the principal decisions upon them, see Greenleaf on Evidence, 15th edit. (1892), note to § 248.

[3] See Jessel, M.R., in Wheeler *v.* Le Marchant, 1881, 17 Ch. D. 681.

[4] Gr. Ev. § 248, in part.

[5] Duch. of Kingston's case, 1776, 20 How. St. Tr. 572 (H. L.); R. *v.* Gibbons, 1823, 1 C. & P. 97; Broad *v.* Pitt, 1828, 3 C. & P. 519.

[6] R. *v.* Gilham, 1828, 1 Moo. C. C. 186. In considering this case and other common law decisions upon the subject of evidence it must be recollected that the common law knew of no distinction between *competent* and *compellable*—such a distinction being entirely the creation of modern statute law. When, therefore, the judges decided (as in 1828, after argument, they all unanimously did in R. *v.* Gilham, 1 Moo. C. C. 186, absentee Hullock, B.) that a clergyman was *competent* to give evidence of a confession made to him, they in effect also decided that he was *compellable* to do so. It has been argued with much ability in Best on Evidence, 8th edit. 1893, §§ 854, 855; Phillimore's Ecclesiastical Law, edit. 1873, pp. 701 et seq.; and in The Privilege of Religious Confessions in English Courts of Justice, by Edward Badeley, M.A.—a convert from Protestantism to the Roman Catholic Church—which was published in London, by Butterworths, in 1865, that confessions to clergymen of the Established Church are privileged, on the ground that the articuli cleri (9 Edw. 2, c. 10), although for centuries treated as obsolete, and at last actually repealed by "The Statute Law Revision Act, 1863" (26 & 27 V. c. 125), were long the law of the land, and that the opinion (given after the Reformation) expressed in Sir Edward Coke's comment on this statute (2 Inst. 629) may be so read as to imply that such privilege extended to everything but high treason. This view, however, cannot be accepted as being at present the law in the teeth of the decision in R. *v.* Gilham; of the dicta of the eminent

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§§ 916, 917. their professional character, they have confidentially acquired; and clerks,[1] bankers,[2] stewards,[3] confidential friends,[4] pursuivants of the Heralds' College,[5] and perhaps even licensed conveyancers,[6] are equally obliged to reveal what has been imparted to them in confidence, except as to matters which the principal himself would not be compelled to disclose, such as his title-deeds and private papers, in a case in which he is not a party.

§ 917.[7] The propriety of extending privilege to communications to clergymen admitting *criminal* conduct, has been strongly urged, on the ground that evil-doers should be enabled with safety to disburthen their guilty consciences, and by spiritual instruction and discipline to seek pardon and relief.[8] The Roman Church adopts this principle in its fullest extent, not only,—as already intimated,[9]—by excepting such confessions from the general rules of evidence, but by punishing the priest who reveals them, and even allows a priest, who has heard a confession as such, when appearing as a witness in his private character, to swear that he knows nothing of the subject.[10] In Scotland, the con-

judges mentioned in note [4] to § 917, in which they tacitly or expressly accept the position that strict law does not admit the privilege, although they protest that they individually will never enforce the strict letter of the law; and of the weight of opinion amongst the writers of text books on the law of evidence. The present Editor has, under these circumstances, advised magistrates that, as they are bound by their oaths to dispense justice to all who seek it of them, without fear, favour, or affection, and as they are also bound to accept without question the law as laid down by the superior courts, they have no alternative but to enforce an answer from a clergyman on a matter relevant to the case before them, and ought not to excuse him on the ground that it is privileged by having been made in confession, and this although they can only punish a witness who refuses to answer by committing him for contempt, and not by merely imposing a fine: The Queen *v.* Flavell, 1884, 14 Q. B. D. 364. The same considerations ought to govern the actions of other inferior courts. It will be noticed that all that the late Sir R. Phillimore ventured to commit himself to was an expression of opinion (Phill. Ecc. Law, 704) that it is "at least not improbable" that the privilege of clergymen of the Church of England as to matters told them in confessions will be recognized when the question next comes before a superior court.

[1] Lee *v.* Birrell, 1813, 3 Camp. 337; Webb *v.* Smith, 1824, 1 C. & P. 337.

[2] Lloyd *v.* Freshfield, 1826, 2 C. & P. 325.

[3] Vaillant *v.* Dodemead, 1792, 2 Atk. 524; Ld. Falmouth *v.* Moss, 1822, 11 Price, 455.

[4] Wilson *v.* Rastall, 1792, as reported 4 T. R. 758 (Ld. Kenyon); Hoffman *v.* Smith, 1803, 1 Caines, 157 (Am.).

[5] Slade *v.* Tucker, 1880, 14 Ch. D. 824.

[6] See (Parke, B.) in Turquand *v.* Bennett, 1836, 6 L. J. Ex. 4.

[7] Gr. Ev. § 247, in great part.

[8] See note [6], to p. 647.

[9] Ante, § 879, and notes.

[10] Mascardus, after observing that, in general, persons coming to the

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fession of a prisoner in custody while preparing for his trial, in order to obtain spiritual advice and comfort, is privileged; but communications made confidentially to clergymen in the ordinary course of their duty, are not.[1] By the common law of England,[2] no distinction is recognised between clergymen and laymen, and all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purposes of justice.[3] By it neither penitential confessions made to the minister or to members of the party's own Church, nor even secrets confided to a Roman Catholic priest in the course of confession, are privileged.[4] In many of the American States, however, confessions made to a priest or other minister of religion in that capacity are rendered privileged by express statutory enactment.[5]

§ 918. Accordingly privilege, in its full extent, applies only between a client and his legal adviser.[6] But it also to some extent exists between employer and employed with regard to communications passing between them. An employer must, for instance, produce reports, &c., made by his servants in the

knowledge of facts under an oath of secrecy are compellable as witnesses to disclose them—states that confessions to a priest are not within the operation of the rule, since they are made not so much to the priest as to the Deity whom he represents. 1 Mas. de Prob. Quæst. v. n. 51; id. Concl. 377. Vide Farin. Op. Tit. 8, Quæst. 78, n. 73.

[1] Tait, Ev. (Sc.) 386, 387; Alison, Pract. of Cr. L. (Sc.) 586; 2 Dickson, Ev. (Sc.) 937—939.

[2] While the law of the Established Church of England encourages a penitent to confess his sins "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet even by its law the minister, to whom the confession is made, is merely excused from presenting the offender to the civil magistrate, and enjoined not to reveal the matter confessed, "under pain of irregularity." Const. & Can. 1 J. 1, Can. cxiii.; 2 Gibson, Cod. p. 963.

[3] R. *v.* Gilham, 1828, 1 Moo. C. C. 186. As to this case, see supra, n.[6] to § 916.

[4] Butler *v.* Moore, 1802, McNally, Ev. 253—255; Anon., 1693, Skin. 404 (Holt, C.J.); Du Barre *v.* Livette, 1791, Pea. R. 77; Com. *v.* Drake, 1818, 15 Mass. 161 (Am.). In Broad *v.* Pitt, 1828, 3 C. & P. 518, Best, C.J., however, said, that he, for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that if he chose to disclose them, he would receive them in evidence. In R. *v.* Griffin, 1853, 6 Cox, C. C. 219, Alderson, B., is reported to have gone further, and to have expressed an opinion that communications made by a prisoner to a clergyman ought not to be disclosed. See, also, R. *v.* Hay, 1860, 2 F. & F. 4; Joy on Conf. (Ir.) 49—58; Jer. Taylor's Sermon on the Anniversary of Gunpowder Treason, 6th vol. of his Works, pp. 614—622, ed. 1828; and a very learned pamphlet by the late Mr. Badeley on the Privilege of Religious Confessions in English Courts of Justice, publ. in 1865.

[5] See Greenleaf on Evidence, 15th ed., 1892, note to § 248.

[6] Thomas *v.* Rawlings, 1859, 27 Beav. 140.

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§§ 918—919. *ordinary* course of their employment; but he will not be compelled to produce those made with a view to and in contemplation of anticipated litigation.[1] And reports, &c., obtained after the controversy has arisen (or post litem motam) are privileged, and will not be ordered to be produced,[2]—and this even though an offer has been made which is in fact based upon them.[3] Moreover, with respect to the *production of title-deeds*, the protection has been held applicable to the case of *trustees* and *mortgagees*, and they cannot be compelled either to produce the deeds of the cestuis que trust, or mortgagors, or to give parol evidence of their contents.[4]

§ 918A. Further, whenever a party is justified in refusing to produce an instrument, he in general cannot be forced to disclose its contents; although some few dicta, or even decisions,[5] to the contrary may be found. Alderson, B., remarks,[6] "It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate."[7]

§ 919. The protection afforded to professional confidence applies though the client be in no way before the court.[8] The rule which excludes hearsay prevents, indeed, this question from often arising with respect to mere oral communications, but it has nevertheless sometimes arisen on occasions when a solicitor has been called upon, either by subpœna duces tecum or otherwise, to produce a document with which he has been

[1] See MacCorquodale *v.* Bell, 1876, 45 L. J. C. P. 329.

[2] Friend *v.* L. C. & D. Rail. Co., 1877, L. R. 2 Ex. 437; Southwark, &c. Co. *v.* Quick, 1878, 3 Q. B. D. 315 (C. A.).

[3] Cooper *v.* Metrop. Bd. of Works, 1883, 25 Ch. D. 472.

[4] Davies *v.* Waters, 1842, 11 L. J. Ex. 214; R. *v.* Upper Boddington, 1826, 8 D. & R. 726; Chichester *v.* M. of Donegal, 1870, L. R. 5 Ch. 497. See Few *v.* Guppy, 1830, 10 Beav. 218, n.; 13 Beav. 457. Also, ante, § 458.

[5] See Cocks *v.* Nash, 1833, 6 C. & P. 154; Marston *v.* Downes, 1834, 1 A. & E. 31; observed upon (Rolfe, B.) in Davies *v.* Waters, 1842, 11 L. J. Ex. 214.

[6] Davies *v.* Waters, 1842, 11 L. J. Ex. 214.

[7] See further post, § 921.

[8] R. *v.* Withers, 1811, cited 5 T. R. 446.

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confidentially intrusted by some *stranger* to the suit. In such a case, if the solicitor claims the privilege of the client, he will be protected not only from producing the deed or other paper, but from answering any question with respect to its nature.[1] Moreover, although on several occasions the court has inspected the document, and pronounced upon its admissibility, according as its production has appeared to be prejudicial or not to the client,[2] yet in strict law, the judge ought not to look at the writing to see whether it is a document which may properly be withheld.[3] The protection exists where documents called for are in the hands of solicitors for the trustees of bankrupts[4]—solicitors, agents, steward or others—for instance. Where the client or principal would have been entitled, if called as a witness, to withhold a document, the solicitor, agent, or steward cannot be compelled, though he will be permitted, to produce it.[5] In such a case, however, if both the client and solicitor, or principal and agent, concur in refusing to produce a document, the party calling for it may give secondary evidence of its contents.[6]

§ 920.[7] This protection, though confined to communications between a client and his legal adviser,[8] extends to all the necessary organs by which such communications are effected; and therefore an *interpreter*,[9] or an *intermediate agent*,[10] is under the

[1] Volant *v.* Soyer, 1853, 22 L. J. C. P. 83. See, also, Bursill *v.* Tanner, 1885, 16 Q. B. D. 1.

[2] 1 Ph. Ev. 175; Doe *v.* Langdon, 1848, 18 L. J. Q. B. 17; Copeland *v.* Watts, 1815, 1 Stark. 95; Ditcher *v.* Kenrick, 1824, 1 C. & P. 161; Doe *v.* Thomas, 1822, 9 B. & C. 299.

[3] Volant *v.* Soyer, 1853, 22 L. J. C. P. 83.

[4] Laing *v.* Barclay, 1821, 1 B. & C. 398; Bateson *v.* Hartsink, 1801, 4 Esp. 43; Cohen *v.* Templar, 1817, 2 Stark. R. 260; Hawkins *v.* Howard, 1824; Corsen *v.* Dubois, 1816, Holt, N. P. R. 239; Bull *v.* Loveland, 1830, 10 Pick. 9, 14. It was at one time thought that the production in such cases was a matter of public duty. Pearson *v.* Fletcher, 1803, 5 Esp. 90.

[5] Hibberd *v.* Knight, 1848, 17 L. J. Ex. 119. See ante, § 458.

[6] Ditcher *v.* Kenrick, 1824, 1 C. & P. 161; R. *v.* Hunter, 1829, 3 C. & P. 591. As to the cases where a witness may refuse to produce his deeds, or to disclose their contents, see ante, §§ 457—460.

[7] Gr. Ev. § 239, in part.

[8] Thomas *v.* Rawlings, 1858, 27 Beav. 140.

[9] Du Barre *v.* Livette, 1791, Peake, R. 77, explained in Wilson *v.* Rasdall, 1792, as reported 4 T. R. 756; Jackson *v.* French, 1829, 3 Wend. 337 (Am.); Andrews *v.* Solomon, 1816, 1 Peters C. C. Rep. 356 (Am.); Parker *v.* Carter.

[10] Bustros *v.* White, 1876, 1 Q. B. D. 423; Bunbury *v.* Bunbury, 1833, 8 L. J. Ch. 297; Walker *v.* Wildman, 1821, 6 Madd. 47; Hooper *v.* Gumm, 1862, 2 J. & H. 602; Churton *v.* Frewen, 1865, 2 Dr. & Sm. 390; Jenkins *v.* Bushby, 1866, L. R. 2 Eq. 547; Reid *v.* Langlois, 1849,

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§§ 920, 921.

same obligation as the legal adviser himself; and if the legal adviser has communicated with such person, he will be as much bound to silence as if he had communicated directly with his client.[1] The rule also extends to a *solicitor's town or local agent*[2] (who is considered as standing in precisely the same situation as the solicitor) to a Scotch solicitor, and to a Scotch law agent practising in England;[3] and it also is applicable to a case submitted, after the institution of the suit, to a *foreign* counsel, and to his opinion thereon.[4] A barrister's or a solicitor's *clerk*, moreover, cannot be permitted to disclose facts coming to his knowledge in the course of employment, unless the barrister or solicitor himself might have been interrogated respecting them.[5] Where a person is sent abroad *by solicitors* to collect evidence respecting a pending suit, letters written by him either to the party himself or to his solicitors on the subject of the evidence are privileged communications.[6]

§ 921. It was said by Lord Cranworth,[7] that "there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they were addressed to communicate them in professional confidence to his solicitor,"[8] but it is submitted his lordship referred only to communications ante litem motam.

19 L. J. Ch. 337. See Doe *v.* Jauncey, 1837, 8 C. & P. 101.

[1] Carpmael *v.* Powis, 1846, 15 L. J. Ch. 275, recognising Walker *v.* Wildman, 1821, 6 Madd. 47.

[2] Parkins *v.* Hawkshaw, 1817, 2 Stark. R. 239; Goodall *v.* Little, 1851, 20 L. J. Ch. 132.

[3] Lawrence *v.* Campbell, 1859, 28 L. J. Ch. 780.

[4] Bunbury *v.* Bunbury, 1833, 8 L. J. Ch. 297.

[5] Taylor *v.* Forster, 1825, 2 C. & P. 195 (Best, C.J.), cited with approbation in Foster *v.* Hall, 1831 (Am.), as reported in 12 Pick. 93; Foote *v.* Hayne, 1824, 1 C. & P. 545; Chant *v.* Brown, 1851-2, 9 Hare, 790; Bowman *v.* Norton, 1831, 5 C. & P. 177; R. *v.* Upper Boddington, 1826, 8 D. & R. 726; Mills *v.* Oddy, 1834, 6 C. & P. 728; Jackson *v.* French, 1829, 3 Wend. 337.

[6] Steele *v.* Stewart, 1843-4, 14 L. J. Ch. 34; Cossey *v.* Lond. Bright. &c. Ry. Co., 1870, L. R. 5 C. P. 146; Lafone *v.* Falkland Islands Co., 1857, 27 L. J. Ch. 25; Hooper *v.* Gumm, 1862, 2 J. & H. 602; Walsham *v.* Stainton, 1863, 2 H. & M. 1; Ross *v.* Gibbs, 1869, L. R. 8 Eq. 522; Bullock *v.* Corry, 1878, 3 Q. B. D. 356.

[7] See ante, § 918, and post, § 1795.

[8] Goodall *v.* Little, 1850-1, 20 L. J. Ch. 132; recognised (Ld. Truro) in Glyn *v.* Caulfield, 1851, 3 Mac. & G. 463; and in Betts *v.* Menzies, 1857, 26 L. J. Ch. 528. See, also, Smith *v.* Daniell, 1875, L. R. 18 Eq. 649, where an opinion, given confidentially and as a friend by Ld. Westbury on a case submitted to him, was ordered to be produced. But see Jenkins *v.* Bushby, 1866, 35 L. J. Ch. 820; and Hamilton *v.* Nott, 1873, L. R. 16 Eq. 112.

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§§ 922, 923.

§ 922. As the privilege is established, not for the benefit of the solicitor, but for the protection of the client,[1] it extends to an executor in regard to papers coming to his hands as the personal representative of the solicitor.[2] If, however, an instrument in the hands of a solicitor, which is privileged from production, come accidentally into the hands of a stranger who makes a copy of it, or if a solicitor, in violation of his duty, voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or permit him to take a copy, the secondary evidence so obtained is admissible in case of notice to produce the original being duly given, and the production resisted on the ground of privilege.[3] Indeed,[4] it has more than once been laid down, that the mere fact that papers and other subjects of evidence have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue. For the court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question.[5]

923. To protect communications, they must have been made to the legal adviser while he was either acting, or at least considered by the client as acting,[6] in that capacity. It is not, however,[7] required that there should have been any regular *retainer*, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character.[8] It would also

[1] Herring *v.* Clobery, 1842, 1 Phil. 91; Anderson *v.* Bank of British Columbia, 1876, 2 C. D. p. 649 (Jessel, M.R.).

[2] Fenwick *v.* Reed, 1816, 1 Meriv. 114.

[3] Calcraft *v.* Guest, [1898] 1 Q. B. 759; Cleave *v.* Jones, 1852, 21 L. J. Ex. 105; Lloyd *v.* Mostyn, 1842, 12 L. J. Ex. 1, questioning contrary decision of Bayley, J., in Fisher *v.* Heming, 1809, cited 1 Ph. Ev. 170. In Lloyd *v.* Mostyn, Parke, B., likened the case to that of an instrument being stolen, and a correct copy taken, and asked whether it would not be reasonable to admit such copy? If the client sustains any injury from such improper disclosure being made, an action will lie against the solicitor. Taylor *v.* Blacklow, 1836, 3 Bing. N. C. 235.

[4] Gr. Ev. § 254A, in great part.

[5] Legatt *v.* Tollervey, 1811, 14 East, 301; Jordan *v.* Lewis, 1739—40, 14 East, 305, n.; Doe *v.* Date, 1842, 3 Q. B. 609; Com. *v.* Dana, 1841, 2 Metc. 329 (Am.).

[6] Smith *v.* Fell, 1841, 2 Curt. 667. There a communication was held to be privileged, which was made by a party to a solicitor, under the impression that the latter acceded to a request to act as his legal adviser.

[7] Gr. Ev. § 241, in part.

[8] Foster *v.* Hall, 1831, 12 Pick.

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§§ 923, 924-5.

seem that if a person be consulted confidentially, under the erroneous supposition that he is a lawyer, he cannot be compelled to disclose the matters communicated.[1] But where a prisoner in custody on a charge of forgery, wrote to a friend, requesting him "to ask Mr. G. or any other attorney" a question respecting the punishment of forgery, the letter was admitted in evidence, on the ground that it did not appear that the relation of attorney and client ever subsisted between Mr. G. and the prisoner.[2] If, too, a party were to go to a person not a solicitor to discount a forged note, or to raise money on a forged will, what passed at the interview would of course not be privileged.[3]

§§ 924-5. It has long been established that, where the *client* himself is the *party interrogated*,[4] all communications between him and his solicitor, whether pending and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not in contemplation of, or with reference to, that litigation, are protected; as also are communications made respecting the subject matter in question, pending, or in contemplation of, litigation on the same subject with other persons, with a view of asserting the same right.[5] Even communications which have passed between a client and solicitor *before any dispute* had arisen between the client and his opponent, are, it is now settled, privileged from production.[6]

89 (Am.). See, also, Bean *v.* Quimby, 1829, 5 New Hamps. 94 (Am.).

[1] Calley *v.* Richards, 1854, 19 Beav. 401, questioning Fountain *v.* Young, 1807, 6 Esp. 113.

[2] R. *v.* Brewer, 1834, 6 C. & P. 363.

[3] R. *v.* Farley, 1846, 2 C. & K. 313. As to solicitors, see ante, § 912; post, § 929.

[4] See Maccann *v.* Maccann, 1862, 32 L. J. P. M. 29.

[5] Holmes *v.* Baddeley, 1844, 14 L. J. Ch. 113; Wigram, V.-C., in Ld. Walsingham *v.* Goodricke, 1843, 3 Hare, 124, citing Bolton *v.* Corp. of Liverpool, 1833, 1 L. J. Ch. 166; Hughes *v.* Biddulph, 1827, 4 Russ. 190; Goodall *v.* Little, 1850-1, 20 L. J. Ch. 132; Thompson *v.* Falk, 1852, 1 Drew, 21; Vent *v.* Pacey, 1830, 4 Russ. 193; Clagett *v.* Phillips, 1842, 2 Y. & C. Ch. 82; Combe *v.* Corp. of London, 1842, 2 Y. & C. Ch. 631. See, also, Goldstone *v.* Williams, [1899] 1 Ch. 47; Woods *v.* Woods, 1844, 14 L. J. Ch. 9; Reece *v.* Trye, 1846, 9 Beav. 316; Adams *v.* Barry, 1843, 2 Y. & C. Ch. 167; Knight *v.* M. of Waterford, 1836, 2 Y. & C. Ex. 38; Curling *v.* Perring, 1835, 4 L. J. Ch. 80; Lyell *v.* Kennedy, 1888, 14 A. C. 437 (H. L.); and Nias *v.* North. & East. Ry. Co., 1838, 7 L. J. Ch. 142. These cases overrule Preston *v.* Carr, 1826, 1 Y. & J. 175; and Newton *v.* Beresford, 1831, Younge, Ex. R. 376. See Ld. Walsingham *v.* Goodricke, 1843, as reported 3 Hare, 129.

[6] Calcraft *v.* Guest, [1898] 1 Q. B. 759; Minet *v.* Morgan, 1873, L. R. 8

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§ 926. If a solicitor be *employed for two parties*, as for mortgagor and mortgagee, and peruse on behalf of the former his abstracts of the title, he cannot, as against him, disclose their contents;[1] and where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, he was not allowed to produce it at the trial against the interest of the purchaser's devisees, though with the consent of the vendor.[2] If, however, a solicitor, acting as such for opposite parties, has an offer made to him by the one for the purpose of being communicated to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party.[3] Where two persons, having a dispute about a claim made by one of them upon the other, went together to a solicitor, when one of

§ 926.

Ch. 361; overruling Ld. Walsingham *v.* Goodricke, 1843, 3 Hare, 124, in which Wigram, V.-C., reluctantly submitted to Radcliffe *v.* Fursman, 1730, 2 Bro. P. C. 514. See, also, Penruddock *v.* Hammond, 1847, 11 Beav. 59; Hawkins *v.* Gathercole, 1850-51, 20 L. J. Ch. 303; Beadon *v.* King, 1849, 17 Sim. 34; and Greenlaw *v.* King, 1838, 3 Beav. 49, in which last case Ld. Langdale compelled a son and heir to discover a case, which had been submitted to counsel by his father, and had come with the estate to his hands. The contrary doctrine to that stated in the text was propounded in Radcliffe *v.* Fursman, 1730, 2 Bro. P. C. 514, by the House of Lords, at a time when the subject of professional confidence was not developed to the same extent as it is at the present day (per Wigram, V.-C., in Ld. Walsingham *v.* Goodricke, 1843, as reported, supra); but although Radcliffe *v.* Fursman was disapproved of by almost every judge under whose notice it was subsequently brought, and its principle was more than once successfully exposed and refuted (see Bolton *v.* Corp. of Liverpool, 1833, 1 L. J. Ch. 166; Pearse *v.* Pearse, 1846, 16 L. J. Ch. 153; Walker *v.* Wildman, 1821, 6 Madd. 47; Preston *v.* Carr, 1826, 1 Y. & J. 175; Ld. Walsingham *v.* Goodricke, 1843, 3 Hare, 124; Bishop of Meath *v.* M. of Winchester, 1836, 3 Bing. N. C. 198 (H. L.); Pearse *v.* Pearse, 1846, 16 L. J. Ch. 153. See, also, two articles in Law Mag. vol. xvii. pp. 51—74, and vol. xxx. pp. 107—123), it was still reluctantly followed till Selborne, L.C., had the hardihood to set it at nought in 1873, in the important case of Minet *v.* Morgan, 1876, supra; followed by Hall, V.-C., in Turton *v.* Barber, 1874, L. R. 17 Eq. 329; and in Bacon *v.* Bacon, 1876, 34 L. T. 349; and by C. P. D. in Mostyn *v.* West Mostyn Coal & Iron Co., 1876, 34 L. T. 531. See, also, Bullock *v.* Corry, 1878, 3 Q. B. D. 356. The view of Selborne, L.C., also derives support from Wilson *v.* Northampton & Banbury Junction Rail. Co., 1872, L. R. 14 Eq. 477; Manser *v.* Dix, 1855, 24 L. J. Ch. 497; Macfarlan *v.* Rolt, 1872, L. R. 14 Eq. 580; and Calley *v.* Richards, 1854, 19 Beav. 401.

[1] Doe *v.* Watkins, 1837, 3 Bing. N. C. 421. But see R. *v.* Avery, 1838, 8 C. & P. 596, cited post, § 929.

[2] Doe *v.* Seaton, 1834, 2 A. & E. 178.

[3] Baugh *v.* Cradocke, 1832, 1 M. & Rob. 182; Cleve *v.* Powell, 1832, 1 M. & Rob. 228; Perry *v.* Smith, 1842, 11 L. J. Ex. 269; Reynell *v.* Sprye, 1846, 16 L. J. Ch. 117.

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§§ 926, 927.

them made a statement, and instructed the solicitor to write a letter to a third party on the subject of the claim,—in a subsequent action between these two persons, both the statement and the letter were held admissible;[1] and if a wife be induced by her husband to deal with her separate interest under the advice of her husband's solicitor, the latter would naturally be regarded by the client as acting for both husband and wife, and, consequently, in the event of any dispute arising between the married couple, each party is entitled to call for the production, and to have full inspection, of all documents that may have come into the possession of the solicitor in the course of the transaction.[2] In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own *exclusive* solicitor? If it was, the bond of secrecy is imposed upon the witness: if it was not, the communication will not be privileged.[3]

§ 927.[4] The protection does not cease with the termination of the suit, or other litigation or business, in which the communications were made; nor is it affected by the party's ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitor's being struck off the rolls,[5] nor by his becoming personally interested in the property, to the title of which the communications related,[6] nor even by the death of the client. The seal of the law, once fixed upon the communications, *remains for ever*,[7] *unless it be removed either by the party himself*,[8] in whose favour it was placed, or perhaps, in the event of his death, by his personal

[1] Shore *v.* Bedford, 1843, 12 L. J. C. P. 138. See, also, Griffith *v.* Davies, 1833, 3 B. & Ad. 502; and Weeks *v.* Argent, 1847, 16 L. J. Ex. 209.

[2] Warde *v.* Warde, 1851, 21 L. J. Ch. 90.

[3] Perry *v.* Smith, 1842, 11 L. J. Ex. 269; Reynell *v.* Sprye, 1846, 16 L. J. Ch. 117.

[4] Gr. Ev. § 243, in part.

[5] Ld. Cholmondeley *v.* Ld. Clinton, 1815, 19 Ves. 268.

[6] Chant *v.* Brown, 1849, 7 Hare, 79.

[7] Wilson *r.* Rastall, 1792, 4 T. R. 759; Parker *v.* Yates, 1827, 12 Moore, C. P. 520. But see Charlton *v.* Coombes, 1863, 32 L. J. Ch. 284; Calcraft *v.* Guest, [1898] 1 Q. B. 759.

[8] Merle *v.* More, 1826, Ry. & M. 390; Baillie's case, 1778, 21 How. St. Tr. 358. "If the client be willing, the court will compel the counsel to discover what he knows" (North, C.J., in Lea *v.* Wheatley, 1678, cited 20 How. St. Tr. 574). See, also, Blenkinsop *v.* Blenkinsop, 1848, 17 L. J. Ch. 343, and Chant *v.* Brown, 1849, 7 Hare, 79.

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representative;[1] and, therefore, if the client becomes a bankrupt, his trustee cannot waive the privilege without his particular permission.[2] Neither does the client waive his privilege by calling the solicitor as a witness, unless he also examines him in chief to the matter privileged;[3] and even in that case, it has been held, in Ireland, that the cross-examination must be confined to the point upon which the witness has been examined in chief.[4]

§ 928. When it is said that the privilege does not terminate with the death of the client, cases where disputes arise between the client's representatives and strangers, and those in which both the litigating parties claim under the client, must be distinguished. Where the litigation is between a client's representatives and strangers, the protection, doubtless, survives for the benefit of those who represent the client; but when it is between litigating parties who both claim under the client, there is no reason why the privilege should belong to one side rather than to the other. Consequently, where the question was, whether certain executors were or were not trustees for the testator's next of kin, the evidence of the solicitor who prepared the will as to what had passed between him and the testator on the subject of the will, has been received on behalf of the next of kin.[5]

§ 929. Whether the protection can be removed without the client's consent, in cases where the interests of *criminal justice* require the production of the evidence, is a point upon which there are conflicting decisions.[6] The prevalent opinion (and it is

[1] Doe *v.* M. of Hertford, 1850, 19 L. J. Q. B. 526.

[2] Bowman *v.* Norton, 1831, 5 C. & P. 177.

[3] Vaillant *v.* Dodemead, 1742, 2 Atk. 524; Waldron *v.* Ward, 1654, Sty. 449; Bate *v.* Kinsey, 1834, 1 C. M. & R. 41.

[4] M'Donnell *v.* Conry, 1843, Ir. Cir. Rep. 807.

[5] Russell *v.* Jackson, 1851, 21 L. J. Ch. 146.

[6] R. *v.* Tylney, 1849, 18 L. J. M. C. 37. Where a party had intrusted a solicitor with a promissory note, and had instructed him to bring an action upon it, Holroyd, J., held that the solicitor ought not to produce the note, on the trial of a subsequent indictment against his client for forgery (R. *v.* Smith, 1822, cited in 1 Ph. Ev. 171; see, also, R. *v.* Hawkins, 1849, 2 C. & K. 823); and a similar decision appears to have been pronounced by the Court of King's Bench in the time of Ld. Mansfield (R. *v.* Dixon, 1765, 3 Burr. 687; see, also, Anon., 1811, 8 Mass. 370). On the other hand, Patteson, J., has compelled a solicitor, who had been employed by a mortgagor and mortgagee to negotiate a loan between them, and had received from the former a forged will as part of his title-deeds, to produce the will on a trial of the mortgagor for forging

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§§ 929, 930. expressed in the last edition of Greenleaf on Evidence as being the law in America[1]) appears to be that even the interests of criminal justice do not justify the production of evidence which is privileged.[2] But where a party having possessed himself of the title-deeds of a deceased person, placed a forged will of the deceased among them, and then sent the whole to his solicitor, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the solicitor might find the will and act upon it,—the judges unanimously held, that the solicitor was bound to produce the will on such party's trial for forgery, it not having been intrusted to him in professional confidence, *even if that would have made any difference.*[3] Where, too, on a trial for forgery of a will, it appeared that prisoner's wife had taken the will to a solicitor, and asked him to advance money upon it for her husband, but he refused to do this, and took a copy of the will, it was held that such copy was admissible as secondary evidence, and that the conversation between the wife and the solicitor was not privileged.[4]

§ 930.[5] The privilege of a solicitor does *not* exist in eight classes of cases, which are as follows:[6] (1) where the knowledge

that instrument (R. *v.* Avery, 1838, 8 C. & P. 596. In R. *v.* Tuffs, 1848, 1 Den. C. C. 324, the learned judge admitted that the language which he, in the case cited, is reported to have used, to the effect that R. *v.* Smith, 1822, supra, was not law, was too strong. See, also, ante, §§ 912, 923). But matrimonial proceedings are *civil* proceedings, though the question at issue may involve the sin of adultery. Branford *v.* Branford, 1879, 20 L. J. Ex. 36.

[1] Greenleaf on Evidence, 15th ed., 1892, § 243.

[2] But it must be remembered that no privilege can exist to protect it where crime is shown to exist. See R. *v.* Cox and Railton, 1884, 14 Q. B. D. 153, ante, § 912.

[3] R. *v.* Hayward, 1846, 2 C. & K. 234. See R. *v.* Jones, 1846, 1 Den. C. C. 166; R. *v.* Brown, 1862, 9 Cox, C. C. 281; and R. *v.* Downer, 1880, 14 Cox, C. C. 486. Clearly the principle of the decision in R. *v.* Cox and Railton, 14 Q. B. D. 153 (ante, § 912), now would cover such a case as this.

[4] R. *v.* Farley, 1846, 2 C. & K. 314. This case, however, is scarcely an authority on either side of the question; for the judges took the distinction that the solicitor consulted was not the prisoner's own legal adviser.

[5] Gr. Ev. § 244, in great part.

[6] Besides those here stated, there is the following exception. In taking a partnership account between solicitors, semble that the plaintiff is entitled to the discovery and production of papers material to the account, though they relate to professional business, and the effect of their production must be that some stranger will become acquainted with matters intrusted to the partners in confidence. Brown *v.* Perkins, 1843, 11 L. J. Ch. 307. This obviously rests on necessity, for otherwise no account could ever be taken between solicitors in partnership.

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§ 930.

was not acquired by the solicitor *solely* by his being employed professionally, but was in some measure obtained by his acting as a *party* to the transaction, and the more especially so, if this transaction was fraudulent;[1] (2) or where the communication was made *before* the solicitor *was employed* as such, or *after* his employment had *ceased;* (3) or where, though consulted by a friend because he was a solicitor, he had refused to act as such, and was therefore only applied to *as a friend;* (4) or where the information was obtained, not exclusively from the client, but also from some other independent source;[2] (5) or where it could not be fairly stated that any communication had been made, as, for instance, where something that then took place became known to a professional adviser from his having been brought to a certain place by the circumstance of his being the professional adviser of a party, but *any other man*, if there, would have been *equally cognisant* of such fact;[3] (6) or where the matter communicated was *not in its nature private*, and could in no sense be termed the subject of a confidential disclosure;[4] (7) or where it had *no reference to professional employment*, though disclosed while the relation of solicitor and client subsisted;[5] (8) or where the solicitor, having made himself a *subscribing witness* and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the solicitor is not called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf; matters which were so committed to him in his capacity of solicitor; and matters which

[1] In Follett *v.* Jefferyes, 1850, 20 L. J. Ch. 65, Rolfe, V.-C., said, "It is not accurate to speak of cases of fraud, contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of a solicitor." See, also, Charlton *v.* Coombes, 1863, 32 L. J. Ch. 284; and Kelly *v.* Jackson, 1849, 13 Ir. Eq. R. 129.

[2] Lewis *v.* Pennington, 1860, 29 L. J. Ch. 670; Marsh *v.* Keith, 1860, 30 L. J. Ch. 127.

[3] Brown *v.* Foster, 1857, 26 L. J. Ex. 249, cited post, § 934. Even such a matter as stated in the text has been held privileged in some of the cases.

[4] See Doe *v.* M. of Hertford, 1850, 19 L. J. Q. B. 526.

[5] Goodall *v.* Little, 1851, 20 L. J. Ch. 132.

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§§ 930, 931. in that capacity alone he had come to know.[1] The eight classes of cases may now be discussed in detail.

§ 931. The first of the cases just mentioned is where the solicitor has obtained his knowledge as a party. Thus, if a solicitor, having been engaged in a conspiracy, turn informer, he cannot be prevented from disclosing what he knows of the transaction, though he may have been employed by some of the guilty parties in his professional character, and have acquired much of his knowledge in consequence of that connection.[2] On the ground, too, that his knowledge was not obtained *merely* as a solicitor, disclosure has been compelled both of a confession made to a solicitor by his client before his retainer respecting an erasure in a will,[3] and also of a gratuitous conversation after the compromise of a suit in which the client stated that he was glad the action was settled, as the promissory note on which it was founded had been indorsed to him without consideration, and with notice that it was void as being mixed up with a lottery transaction.[4] On the other hand, where a person, having possession of a deed in the character of trustee to the defendant, had first obtained a knowledge of its contents while acting as his solicitor, the knowledge thus obtained was held to be privileged;[5] and where a solicitor became a trustee under a deed for the benefit of his client's creditors, subsequent communications made to him by the client were held privileged.[6]

[1] Per Ld. Brougham, in Greenough *v.* Gaskell, 1833, 1 Myl. & K. 100. See, also, Desborough *v.* Rawlins, 1838, 7 L. J. Ch. 171; Bolton *v.* Corp. of Liverpool, 1833, 1 Myl. & K. 94; Annesley *v.* Ld. Anglesea, 1743, 17 How. St. Tr. 1430 (Ir.).

[2] Greenough *v.* Gaskell, 1833, as reported 1 Myl. & K. 103, 104, 109 (Ld. Brougham). In Duffin *v.* Smith, 1792, Pea. R. 108, usury in a mortgage was proved by the plaintiff's solicitor, who prepared the deed, and who was called by the defendant to prove the consideration usurious. The judge (Ld. Kenyon) who admitted this evidence assumed that the solicitor had, by his conduct, become a party to the transaction; but as the facts do not warrant this assumption, the case cannot be supported at the present day (see Ld. Brougham's remarks in Greenough *v.* Gaskell, 1833, as reported, 1 Myl. & K. 109, and also ante, § 929), so that it is only valuable as recognising the general principle, that if a solicitor acts as a party, no knowledge he obtains will be privileged.

[3] Cutts *v.* Pickering, 1672, 1 Ventr. 197.

[4] Cobden *v.* Kendrick, 1791, 4 T. R. 431.

[5] Davies *v.* Waters, 1842, 11 L. J. Ex. 214. There, the witness, as *trustee*, might equally have refused to state the contents of the deed, but it was objected in Banc that this point was not raised at Nisi Prius. See ante, § 918.

[6] Pritchard *v.* Foulkes, 1837, Coop. C. P. 14.

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§ 932. The second class of cases in which a solicitor's knowledge is not privileged is where it was acquired *before* or *after* his professional employment. Accordingly, where a trustee for two parties had acted as solicitor for one, in certain disputes which had arisen between the two on the subject of the trusts, it was held that, inasmuch as he had been voluntarily placed in a situation inconsistent with his duty as trustee for both parties, the communications between him and his client were not privileged as against the other cestui que trust;[1] and a solicitor who had been confidentially consulted, but had not been professionally employed, because he was then acting as undersheriff, was held bound to disclose what had been communicated to him.[2] On the like ground[3] that the knowledge gained by him was not by reason of its being intrusted to him in his professional character, but merely by his being present at the conversation,[4] a witness called by the plaintiff has also been permitted to state a conversation, in which the defendant proposed a compromise to the plaintiff, although, when the conversation took place, the witness was attending as solicitor for the defendant. If, too, a solicitor, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him;[5] while if communications from an adverse party be made, either directly to the solicitor for the purpose of being communicated to the client,[6] or to the client himself in the presence of the solicitor,[7] the solicitor is not at liberty to withhold them. A solicitor is indeed bound, it seems, to produce all

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[1] Tugwell *v.* Hooper, 1847, 16 L. J. Ch. 171.

[2] Wilson *v* Rastall, 1792, 4 T. R. 460. See Calley *v.* Richards, 1854, 19 Beav. 401.

[3] Griffith *v.* Davies, 1833, 5 B. & Ad. 502. See, also, Shore *v.* Bedford, 1843, 12 L. J. C. P. 138; Weeks *v.* Argent, 1847, 16 L. J. Ex. 209.

[4] Per Alderson, B., in Davies *v.* Waters, 1842, 11 L. J. Ex. 214.

[5] Per Parke and Patteson, JJ., 1833; commenting on and questioning Gainsford *v.* Grammar, 1809, 2 Camp. 9. See, also, Ripon *v.* Davies, 1833, 2 N. & M. 310; and Reynell *v.* Sprye, 1846, 16 L. J. Ex. 25.

[6] Spenceley *v.* Schulenburgh, 1806, 7 East, 357. There the solicitor was held bound to discover the contents of a notice to produce documents, which he had received from the opposite solicitor. See, also, Ford *v.* Tennant, 1863, 32 L. J. Ch. 465; Gore *v.* Bowser, 1851, 21 L. J. Ch. 10; Paddon *v.* Winch, 1870, L. R. 9 Eq. 666.

[7] Desborough *v.* Rawlins, 1838, 7 L. J. Ch. 171.

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§§ 932, 933.

letters, and to disclose all information, communicated to him from *collateral* quarters.[1]

§ 933. The third class of cases in which there is no privilege is where the solicitor has been consulted *as a friend* on matters of fact, and not as a *legal* adviser. In this case, he must disclose all questions put to him by his client as to *matters of fact*, as distinguished from those put with the view of obtaining *legal advice*, together with his answers thereto.[2] On a question[3] whether the client had committed an act of bankruptcy on a particular day on which he had inquired of his solicitor whether he could safely attend a particular meeting of his creditors without being arrested for debt, and by the solicitor's advice had remained in the latter's office for two hours to avoid being arrested, and till the solicitor returned from the meeting, even what had passed between the solicitor and his client was allowed to be given in in evidence. Lord Tenterden observing,[4] that "a man could hardly ask, *as matter of law*, whether he would be free from arrest while attending a voluntary meeting of creditors, though he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest;" and his lordship added, "The solicitor gives no *legal* advice, his answer implying that no arrangement had been made, but that he would see at the meeting whether any could be effected; and he recommends his client, not as a *legal adviser*, but as any agent or any friend might have recommended, to stay where he was till that matter of fact could be ascertained." The fourth class of cases in which no privilege exists, namely, where the solicitor's knowledge has come from an independent

[1] Thus, a communication between a solicitor and one of his client's witnesses as to the evidence to be given by the witness, is not privileged: Mackenzie *v.* Yeo, 1841, 2 Curt. 866. But, semble, a solicitor is not bound to produce the "proof" of a witness's evidence, which he had prepared for insertion in his counsel's brief (Bovill, C.J., in the Tichborne case, 28th Feb. 1872, MS.).

[2] Sawyer *v.* Birchmore, 1835, 3 My. & K. 572; Spenceley *v.* Schulenburgh, 1806, 7 East, 357; Desborough *v.* Rawlins, 1838, 7 L. J. Ch. 171.

[3] Bramwell *v.* Lucas, 1824, 4 D. & R. 367; observed upon (Ld. Brougham) in Greenough *v.* Gaskell, 1833, as reported 1 Myl. & K. 113—115; and also (Ld. Cottenham) in Desborough *v.* Rawlins, 1838, as reported 3 Myl. & Cr. 520—522.

[4] Bramwell *v.* Lucas, 1824, as reported 2 B. & C. 749, 750. The case, however, seems very open to doubt *on the facts*.

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source, and not from the client, is so obvious that it does not require illustration.

§ 934. The fifth of the above class of cases in which there is no professional privilege, is where the legal adviser's knowledge of a fact was not communicated directly to him by his client, but he came to know of it during the progress of a trial, and it would have been equally known to any other man who had been present. For instance, where[1] counsel had attended before a magistrate on behalf of a man charged with embezzlement, when the prosecutor had produced a book, in which the accused, contrary to his duty, had omitted to enter a sum of money received by him, and which was on a subsequent examination found to contain the entry: it was held at a trial for malicious prosecution, that the counsel might give evidence that the entry was not in the book at the time of the first examination. Similarly, a solicitor may be called, either to prove his client's handwriting, though he be acquainted with it only from having seen him sign documents in the cause;[2] or to disclose the name of the person by whom he was retained, in order to let in the declarations and admissions of the real party in interest;[3] or to discover when and to whom he parted with his client's title-deeds, and in whose possession they are,[4] so as to let in secondary evidence of the contents. In the latter case the solicitor will be bound to answer whether the documents are in his possession or elsewhere in court, even though they may have been obtained from his client in the course of communication with reference to the cause.[5]

§ 935. The sixth class of cases in which privilege was stated not to exist, is where the information is not in its nature private, or such that it can be considered as having been given in confidence. On this ground a legal adviser is (as we have just seen) bound to

[1] Brown *v.* Foster, 1857, 26 L. J. Ex. 249. See, also, Wheatley *v.* Williams, infra, § 937A.

[2] Hurd *v.* Morin, 1824, 1 C. & P. 372; Johnson *v.* Daverne, 1821, 19 Johns, 134 (Am.).

[3] Bursill *v.* Tanner, 1885, 16 Q. B. D. 1 (C. A.); Levy *v.* Pope, 1829, M. & M. 410; Brown *v.* Payson, 1833, 6 New Hamp. 443 (Am.).

[4] Banner *v.* Jackson, 1847, 1 De G. & Sm. 472 (K. Bruce, V.-C.), reluctantly following Stanhope *v.* Knott, undated, 2 Swans. 221, n., and Kingston *v.* Gale, 1676, Rep. temp. Finch, 259.

[5] Dwyer *v.* Collins, 1852, 21 L. J. Ex. 225; Coates *v.* Birch, 1841, 2 Q. B. 252; Bevan *v.* Waters, 1828, M. & M. 235; Eicke *v.* Nokes, 1829, M. & M. 303; Roupell *v.* Haws, 1863, 3 F. & F. 784.

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§§ 935, 936.

furnish his client's *name*,[1] and any information in his power as to his address, especially if the client be a ward in Chancery, who is attempting to conceal his residence from the court;[2] he may be called to identify his client as the person who has put in any pleadings, or sworn any affidavit, because these acts, so far from being secrets, are in their very nature matters of publicity;[3] from one case it would even seem that he may be compelled to divulge the character in which his client employed him, as, for instance, whether as executor, or trustee, or on his own private account;[4] and a solicitor, who has prepared a will at the instance of a party benefited by it, is not privileged to withhold from the Probate Division of the High Court any facts which are connected with contemporaneous business transacted between the testator and himself on account of his client the legatee, when his opinion of the testator's capacity to make a will is in any degree founded on such facts.[5]

§ 936. The seventh class of cases as to which privilege cannot be claimed, was stated to be where the communications were not in their nature private, or made with reference to professional employment, and were, therefore, so far as professional relations were concerned, quite unnecessary. Accordingly a prosecutor's solicitor has been allowed to state that, pending the proceedings on the indictment, his client had observed to him that he would give a large sum to have the prisoner hanged;[6] and, in an action by a solicitor for his bill, where the question was whether he had been employed by the defendant or by a third party, a statement made by the plaintiff to his agent at the time of the employment and when introducing such third party to the agent was held

[1] Bursill *v.* Tanner, 1885, 16 Q. B. D. 1 (C. A.); ante, n. to § 934

[2] Ramsbotham *v.* Senior, 1869, L. R. 8 Eq. 575; Burton *v.* Ld. Darnley, 1869, L. R. 8 Eq. 576, n.; Ex parte Campbell, 1870, L. R. 5 Ch. 703. But see Heath *v.* Crealock, 1873, L. R. 15 Eq. 257.

[3] B. N. P. 284 b; Studdy *v.* Sanders, 1823, 2 Dowl. & R. 347; Doe *v.* Andrews, 1778, 2 Cowp. 846; cited by Ld. Brougham in Greenough *v.* Gaskell, 1833, as reported 1 Myl. & K. 108, overruling R. *v.* Watkinson, 1739-40, 2 Str. 1122.

[4] Beckwith *v.* Benner, 1834, 6 C. & P. 681. It has, however, been held in America that counsel could not state whether they were employed to conduct an ejectment for their client, as *landlord of the premises*: Chirac *v.* Reinicker, 1826, 11 Wheat, 280 (Am.).

[5] Jones *v.* Goodrich, 1844, 5 Moo. P. C. 16, P.C.

[6] Annesley *v.* Ld. Anglesea, 1743, 17 How. St. Tr. 1430; Cobden *v.* Kendrick, 1791, 4 T. R. 431, cited ante, § 931.

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§§ 936—938.

not to be privileged.[1] The eighth, and last, class of cases in which communications are not privileged, arises where a solicitor *attests an instrument* which his client executes. In this event he may be compelled, either to prove the execution, or to disclose all that passed at that time, even though such evidence may establish the invalidity of the deed; for by voluntarily becoming a subscribing witness he makes himself a public man, and pledges himself to give evidence on the subject, whether he be called by the party by or to whom the deed is executed, or by any other person who claims an interest in the property.[2]

§ 937. Accordingly, where the assignees of a bankrupt, to establish that a conveyance made by a bankrupt to his son was fraudulent, called the bankrupt's solicitor, he was, as attesting witness to the deed, held bound to disclose what took place at the time of its execution.

§ 937A. In the case just cited, however, the very legal adviser who as an attesting witness was held not to be privileged, was also held to be privileged from stating what occurred during its concoction and preparation, and not liable to be asked whether it had not been subsequently destroyed, if the only knowledge he had, as to its concoction, preparation or destruction, was acquired from his confidential situation as solicitor.[3] Moreover, a legal adviser cannot disclose in what condition an instrument was when it was intrusted to him by his client, as whether or not it then were stamped, or indorsed, or had an erasure upon it;[4] nor even for what purpose his client brought it to him.[5]

§ 938.[6] We have now seen that the first class of persons who, on grounds of public policy, are privileged from disclosing communications made to them as such are *husband and wife;* and that the second class of such persons consists of *legal advisers.* The third class of persons who are privileged on the grounds mentioned above, are *judges, arbitrators,* and *counsel,* persons who

[1] Gillard *v.* Bates, 1840, 9 L. J. Ex. 171. See, also, Caldbeck *v.* Boon, 1872, Ir. R. 7 C. L. 32.

[2] Doe *v.* Andrews, 1778, 2 Cowp. 846; Robson *v.* Kemp, 1803, 4 Esp. 234; Crawcour *v.* Salter, 1881, 18 Ch. D. 30; Sandford *v.* Remington, 1793, 2 Ves. 189.

[3] Robson *v.* Kemp, 1803, 4 Esp. 234.

[4] Wheatley *v.* Williams, 1836, 5 L. J. Ex. 237. Cf. Brown *v.* Foster, 1857, 26 L. J. Ex. 249, supra, § 934. See, also, B. N. P. 284, a; and Brown *v.* Payson, 1833, 6 New Hamp. 443 (Am.).

[5] Turquand *v.* Knight, 1836, 6 L. J. Ex. 4.

[6] Gr. Ev. § 249, in part.

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§ 938. are not compellable to testify as to matters in which they have been judicially or professionally engaged. They may, indeed, like ordinary persons, be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended.[1] It is considered dangerous, or at least highly inconvenient, to compel judges of courts of record to state what occurred before them in court; and on this ground the grand jury have been advised not to examine a chairman of quarter sessions, as to what a person testified in a trial in his court.[2] The general policy as to arbitrators is the same; and the courts will not disturb the deliberate decision of an arbitrator, by requiring him to disclose the grounds of his award, or what passed in his own mind when exercising his discretionary powers as to the matters submitted to him,[3] unless indeed under very cogent circumstances, such as upon an allegation of fraud; for *Interest reipublicæ ut sit finis litium.*[4] A judge or an arbitrator is, however, a *competent* witness, and may, by his own consent, be examined respecting the facts proved, or the matters claimed, at the trial or the reference.[5] Moreover, he may be asked questions as to what passed before him, and as to what matters were presented to him for consideration, or for the purpose of showing that, as a fact, he has exceeded his powers, as, for instance, by awarding compensation for injuries not included in the matters submitted to him.[6] Again, barristers cannot be forced to prove what was stated by them on a motion before the court.[7] The like privilege has been strenuously claimed, though not expressly recognised, where a counsel was

[1] R. *v.* E. of Thanet, 1799, 27 How. St. Tr. 845; Ponsford *v.* Swaine, 1861, 1 J. & H. 433.

[2] R. *v.* Gazard, 1838, 8 C. & P. 595. See, also, upon this subject the remarks of Collins, M.R., as president of the committee which in the year 1904, inquired into the case of Mr. Adolph Beck, the remarks being made in explanation of the course pursued by the committee in receiving the evidence of Grantham, J. and of the Recorder of London, the two judges who had respectively presided over the two trials of Mr. Beck. Blue Book, 1904, Cd. 2315.

[3] Duke of Buccleuch *v.* Metropolitan Board of Works, infra.

[4] Johnson *v.* Durant, 1831, 4 C. & P. 327; Ellis *v.* Saltau, 1808, 4 C. & P. 327, n.; Ponsford *v.* Swaine, 1861; Story, Eq. Pl. §§ 599, 824, 825, n.; 2 Story, Eq. Jur. §§ 1457, 1498; Anon., 1748, 3 Atk. 644.

[5] Martin *v.* Thornton, 1796, 4 Esp. 181.

[6] D. of Buccleuch *v.* Met. Board of Works, 1872, L. R. 5 H. L. 418 (H. L.).

[7] Curry *v.* Walter, 1796, 1 Esp. 456.

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called upon as a witness to disclose a confidential negotiation, into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed.[1]

§ 939.[2] The *fourth kind* of cases, in which evidence is excluded from motives of public policy, comprises *secrets of State*, or matters which concern the administration, either of penal justice, or of government, and the disclosure of which would be prejudicial to the public interest. The principle of the rule of exclusion is in both cases concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires. The protection to State Papers afforded by this principle extends, it is almost needless to say, to applications for discovery, and there are many instances of such applications.[3] In accordance with these principles, the public prosecutor is in a prosecution carried on by him, not obliged (unless so ordered by the judge) to state who set him in motion.[4] In Crown prosecutions, and in informations for frauds committed against the revenue laws, witnesses for the Crown *will not*, on cross-examination, *be permitted to disclose* either the names of their employers, or the nature of the connection between them, or the names of the persons from whom they received information, or the names of those to whom they gave information, whether such last-mentioned persons were magistrates, or actually concerned in the executive administration, or were only the channel through which the communication was made to Government.[5] Neither can a witness be asked whether he himself was the informer.[6] Eyre, L.C.J., said:[7] "It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed."

[1] Baillie's case, 1778, 21 How. St. Tr. 318.

[2] Gr. Ev. § 250, in great part.

[3] Hennesy *v.* Wright, 1888, 57 L. J. Q. B. 594.

[4] Marks *v.* Beyfus, 1890, 25 Q. B. D. 494 (C. A.).

[5] R. *v.* Watson, 1817, 2 Stark. R. 139; R. *v.* Hardy, 1794, 24 How. St. Tr. 704, 1 Ph. Ev. 178—180.

[6] Att.-Gen. *v.* Briant, 1846, 15 L. J. Ex. 265.

[7] Hardy's case, 1794, 24 How. St. Tr. 808.

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§§ 940, 941.

§ 940. The protection of this rule will be upheld, though the witness, in his examination in chief, has admitted that suggestions have been made to him on the part of the Government.[1] The doctrine has been even carried so far, that a witness, who had consulted a private friend by whom he had been advised to communicate his information to Government, was held by a majority of the judges unable to disclose the name of his friend,[2] the judges thinking[3] that all questions tending to the discovery of the channels by which the information was given to the officers of justice were, upon the general principle of public convenience, to be suppressed; that all persons in that situation were protected from the discovery; and that, if an objection were raised to the question, it was no more competent for the defendant to ask who had advised the witness to give information, than to ask to whom he had given it in consequence of that advice, or to put any other question respecting the channel of communication.[4] A witness may, however, be asked, whether the person to whom the information was communicated was a magistrate or not.[5]

§ 941. It may be doubted whether this rule of protection extends to ordinary prosecutions.[6] Even when it applies,—as it unquestionably does whenever the Government is directly concerned,—it may sometimes, if rigidly enforced, be productive of great individual hardship; since, where a witness is giving an account of what occurred at a distant period, it is obviously material to ascertain whether he gave substantially the same account recently after the transaction; and if the object be to shake the credit of the witness, it is equally important to know whether a communication, which he asserts that he made to a certain person, was, in fact, ever so made. On the other hand, it is absolutely essential to the welfare of the State, that the names of parties who interpose in situations of this kind should not be divulged; for otherwise,—be it from fear, or shame, or

[1] R. *v.* O'Connell, 1843, Arm. & T. 178, 179 (Ir.). See, also, pp. 233, 240, of Arm. & T., where the general doctrine was recognised and acted upon.

[2] R. *v.* Hardy, 1794, 24 How. St. Tr. 808—820 (Eyre, C.J., Hotham, B., and Grose, J., pro; Macdonald, C.B., and Buller, J., con.).

[3] Gr. Ev. § 250, in part.

[4] R. *v.* Hardy, 1794, as reported 24 How. St. Tr. 816 (Eyre, C.J.).

[5] Id. 808.

[6] Att.-Gen. *v.* Briant, 1846, 15 L. J. Ex. 265; R. *v.* Richardson, 1863, 3 F. & F. 693.

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§§ 941—943.

the dislike of being publicly mixed up in inquiries of this nature, —few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished.[1]

§ 942.[2] For the same reasons of public policy and in the furtherance of justice, the *proceedings of grand jurors* are regarded as privileged. Some imagine that a preliminary inquiry as to the guilt or innocence of a party accused ought to be secretly conducted.[3] At all events every grand jury is sworn to secrecy. One reason of this was to prevent the escape of the party, if he got to know that proceedings were in train against him; another is said to be, to secure freedom of deliberation and opinion among grand jurors. The first reason assigned is now met by the fact, that most crimes are primarily investigated by an open inquiry before the committing magistrate. The second supposed reason rests on an assumption of pusillanimity and meanness, which those who constitute the grand jury but little deserve. A third reason may possibly be to prevent an opportunity of the evidence given before the grand jury being contradicted before the petty jury by subornation of perjury.[4]

§ 943. The privilege extends not only to the grand jury themselves, but to their clerk,[5] if they have one, and to the prosecuting officer,[6] if present at their deliberations; all these being equally concerned in the administration of the same portion of penal law. On the prosecution of a witness for perjury committed before the grand jury, not only may a mere witness who was there and heard what was said give evidence,[7] but apparently so may the persons just enumerated. With this exception, however, they are not permitted to disclose what number of jurors were present when a case was brought before them, or the number or names of the jurors who agreed or refused to find the bill of indictment;[8]

[1] Home *v.* Bentinck, 1820, 2 B. & B. 162; U. S. *v.* Moses, 1827, 4 Wash. 726 (Am.).

[2] Gr. Ev. § 252, in part.

[3] In R. *v.* Bullard, 1872, 12 Cox, C. C. 353, Byles, J., observed, that "the grand jury were a secret tribunal, and not bound by any rules of evidence."

[4] See observations on grand juries, in Law Mag. vol. xxxi. pp. 242—251.

[5] 12 Vin. Abr. Ev. B. a. 5.

[6] So decided in America, Com. *v.* Tilden (undated) 2 Stark. Ev. 232, n. (Am.); M'Lellan *v.* Richardson, 1836, 1 Shepl. 82 (Am.).

[7] Reg. *v.* Hughes, 1844, 1 C. & K. 519.

[8] R. *v.* Marsh, 1837, 6 A. & E. 236. See 4 Hawk. P. C. b. 2, c. 25.

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§§ 943, 944. neither can they be called on the trial of the original indictment to explain their finding,[1] or to detail the evidence on which the accusation was founded,[2] or to show that a witness has given testimony in court contrary to what he had sworn before them.[3]

§ 944.[4] The privilege extends to and excludes the testimony of *traverse* or *petty jurors*, when offered to prove *mistake* or *misbehaviour* by the jury in regard to the verdict.[5] Accordingly, on a motion to amend the postea by increasing the damages, the court refused to admit an affidavit sworn by all the jurymen, in

§ 15. In America, grand jurors have been asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact: M'Lellan *v.* Richardson, 1836, 1 Shepl. 82 (Am.); Low's case, 1827, 4 Greenl. 439 (Am.); Com. *v.* Smith, 1812, 9 Mass. 107 (Am.).

[1] R. *v.* Cooke, 1838, 8 C. & P. 582.

[2] See R. *v.* Watson, 1817, 32 How. St. Tr. 107 (Ld. Ellenborough); and R. *v.* Marsh, 1837, 6 A. & E. 236, arg.; Hindekoper *v.* Cotton, 1834, 3 Watts, 56 (Am.); M'Lellan *v.* Richardson, 1836, 1 Shepl. 82 (Am.); Low's case, 1827, 4 Greenl. 439 (Am.); Burr's trial, about 1807, [Anon.], Ev. for deft. p. 2 (Am.).

[3] In England, the competency of a grand juror to testify in other than criminal cases as to what a witness said before the grand jury is doubtful. See Stephen's Evidence, art. 114. In some of the United States it has, however, been decided to be receivable. See Greenleaf on Ev., 15th edit. (1892), § 252; Carr *v.* Mead, 1858, 12 Gray, 166 (Am.); Jones *v.* Turpin, 1871, 6 Heisk. (Tenn.) 181 (Am.); State *v.* Wood, 1873, 53 New Hamp. 484 (Am.); Stattuck *v.* State, 1858, 11 Ind. 473 (Am.); Burdick *v.* Hunt, 1873, 43 Ind. 38 (Am.). In an action, however, for a malicious indictment, the plaintiff has twice been allowed to call one of the grand jury, in order to prove that the defendant was the prosecutor (Sykes *v.* Dunbar, 1800, 2 Selwyn, N. P. 1081 (Ld. Kenyon); Freeman *v.* Arkell, 1823, 2 B. & C. 494 (Park, J.)). As to criminal cases, Chitty (1st vol. of Crim. Law, p. 322), states that perjury before a grand jury is indictable, and refers to his vol. on Prec., which contains nothing on the subject. Christian, also, in a note to 4 Bl. Com. 126, narrates that, at York, a grand juror hearing a witness swear in court contrary to the evidence which he had given before the grand jury, told the judge, "and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury." What became of this case does not appear. By the N. York Cr. Code, § 267, "Every member of the grand jury must keep secret, whatever he himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted on a matter before them." § 268. "A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor." This appears to be the common-sense view of the matter.

[4] Gr. Ev. § 252, in part.

[5] So, also, in America. See Greenleaf on Ev., 15th edit. (1892), § 252 a, and notes; Woodward *v.* Leavitt, 1871, 107 Mass. 453 (Am.); Rowe *v.* Carney, 1885, 139 Mass. 41 (Am.).

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§§ 944—946.

which they stated their intention to have been to give the plaintiff such increased sum.[1] On several occasions, affidavits that verdicts have been decided by lot have been rejected on motions for new trials, whether such affidavits were sworn by individual jurymen,[2] or by strangers, stating the subsequent admissions of jurors to the deponents,[3] or even stating that a declaration to this effect had been made by one juror in the hearing of his fellows in open court after the verdict had been pronounced;[4] and, so also in America, has a juryman's affidavit as to alleged conversations passing between him and another juror on their way to or from the court.[5] In all cases of this kind, the court must obtain their knowledge of the misconduct complained of, either from the officer who had charge of the jury,[6] or from some other person who actually witnessed the transaction.[7] But, although a juryman's affidavit of what occurred in the jury box during the trial cannot be received, it is admissible to explain the circumstances under which he came into the box.[8]

§ 945. But a similar privilege is not extended to a clerk to the Property Tax Commissioners, who is bound to produce in a court of justice his official books, and to answer all questions respecting the collection of the tax, though sworn, on entering the office, not to disclose anything learnt in that capacity, without the consent of the Commissioners, or unless by force of some Act of Parliament.[9]

§ 946. On principles of public policy again, no witness,—whether a Peer, an M.P., an officer of either House, or a short-hand writer,—can be forced, without the permission of the House having been first obtained, to disclose in a court of justice what took place *within the walls of Parliament*, or to relate any expressions or arguments that may have been used by one of the

[1] Jackson *v.* Williamson, 1788, 2 T. R. 281.

[2] Vasie *v.* Delaval, 1785, 1 T. R. 11; Owen *v.* Warburton, 1805, 1 Bos. & P. N. R. 326; Heyes *v.* Hindle, 1863, in Q. B. M. T. 1863, MS.; Little *v.* Larrabee, 1822, 2 Greenl. 37 (Am.).

[3] Straker *v.* Graham, 1839, 8 L. J. Ex. 86; The State *v.* Freeman, 1824, 5 Conn. 348 (Am.); Meade *v.* Smith, 1844, 16 Conn. 346 (Am.).

[4] Burgess *v.* Langley, 1843, 12 L. J. C. P. 257; Raphael *v.* Bk. of England, 1855, 25 L. J. C. P. 33.

[5] Comm. *v.* White, 1888, 147 Mass. 76 (Am.).

[6] Burgess *v.* Langley, 1843, as reported 5 M. & Gr. 725 (Cresswell, J.).

[7] Vasie *v.* Delaval, 1785, 1 T. R. 11 (Ld. Mansfield).

[8] Bailey *v.* Macaulay, 1849, 19 L. J. Q. B. 73.

[9] Lee *v.* Birrell, 1820, 3 Camp. 237.

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§§ 946, 947.

members in the course of debate.[1] Although he may probably be asked as to the fact, he may decline to answer any question as to whether or not a member spoke upon a particular subject of discussion,[2] or as to what he said, or as to the manner in which votes were given on a division.[3]

§ 947.[4] On grounds of public policy, too, official transactions between the *heads of the departments of Government and their subordinate officers;* and communications relating to state matters made by one officer of state to another in the course of his official duty, are treated as *secrets of State*, and are absolutely privileged.[5] Thus, communications between a colonial governor and his attorney-general, on the condition of the colony or the conduct of its officers,[6] or between such governor and a military officer under his authority;[7] the report of a military commission of inquiry, made to the commander-in-chief;[8] the report of a collision at sea, made by the captain of one of the ships to the Lords Commissioners of the Admiralty;[9] the report submitted to the Lord Lieutenant of Ireland by an Inspector General of the prisons;[10] and the correspondence between an agent of the Government and a Secretary of State;[11] or between the Directors of the East India Company and the Board of Control, under the old law;[12] or between an officer of the Customs and the Board of Commissioners;[13] or dispatches between a Secretary of State for

[1] Plunkett *v.* Cobbett, 1804, 5 Esp. 136; Chubb *v.* Salomons, 1852, 3 C. & K. 75.

[2] Plunkett *v.* Cobbett, 1804, 5 Esp. 136.

[3] Chubb *v.* Salomons, 1852, 3 C. & K. 75.

[4] Gr. Ev. § 251, in great part.

[5] Chatterton *v.* Sec. of State for India, 1895, 2 Q. B. 189; Hennesy *v.* Wright, 1888, 57 L. J. Q. B. 594. By the N. York Civ. Code, § 1710, r. 5, "a public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure."

[6] Wyatt *v.* Gore, 1816, Holt, N. P. R. 299.

[7] Cooke *v.* Maxwell, 1817, 2 Stark. N. P. 183.

[8] Home *v.* Bentinck, 1820, 2 B. & B. 162; Beatson *v.* Skene, 1860, 29 L. J. Ex. 430; Dawkins *v.* Ld. Rokeby, 1873, L. R. 8 Q. B. 255.

[9] H.M.S. Bellerophon, 1874, 44 L. J. Adm. 5.

[10] M'Elveney *v.* Connellan, 1864, 17 Ir. C. L. R. 55.

[11] Anderson *v.* Hamilton, 1816, 8 Price, 244; Cooke *v.* Maxwell, 1817, 2 Stark. N. P. 183 (Ld. Ellenborough, cited by the Att.-Gen.); Stace *v.* Griffith, 1869, L. R. 2 P. C. 420; Marbury *v.* Madison, 1803, 1 Cranch. 144 (Am.).

[12] Smith *v.* E. India Co., 1841, 1 Phill. 50; Rajah of Coorg *v.* East India Co., 1856, 25 L. J. Ch. 345; Wadeer *v.* E. India Co., 1856, 8 De G. M. & G. 182.

[13] Black *v.* Holmes, 1822, 1 Fox & Sm. 28 (Ir.).

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§ 947.

the Colonies and a Colonial Governor;[1] or a report by an officer of Inland Revenue,[2] are confidential and privileged matters, the disclosure of which the interests of the State will not permit to be enforced. Not only are such communications privileged, but no secondary evidence of them can be given, and it seems probable that even where an officer of State is indisposed to claim the privilege it is the duty of the judge to interpose and prevent the evidence being admitted.[3] Until recently, there existed, however, no[4] instance of a document being held protected from production unless it contained a communication made *by* one officer of State to another officer of State in the course of official communication between them on a matter of public business. But the Court of Appeal have recently held[5] that a communication which it can see is to be one *to* a Government Department is also protected from production as being a State secret if a Minister, or the Head of the Department, sees fit to claim such protection for it, and this even though he gives reasons for the claim which are founded on grounds of convenience rather than of State policy.[6] According to the Court of Appeal,[7] the minister to whose department a document belongs, or the head of a department in whose custody it is, is the exclusive judge as to

[1] Hennessey *v.* Wright, 1888, 57 L. J. Q. B. 594.

[2] Hughes *v.* Vargas, 1893, 9 T. L. R. 92 (C. A.).

[3] Chatterton *v.* Sec. of State for India, supra.

[4] Blake *v.* Pilford, 1832, 1 M. & Rob. 198 (Taunton, J.), is not an authority that such a document is *not* privileged, but is properly explicable according to the C. A. on the ground mentioned below.

[5] Latter *v.* Goolden, 10th Nov. 1894, C. A.; unreported, but in which a former editor of this work was counsel, see 9th ed., § 947.

[6] In Joseph Hargreaves, Lim., In re, [1900] 1 Ch. 347, the question arose whether privilege could be claimed for inland revenue returns in the possession of the Board of Inland Revenue. Wright, J., at the hearing refused to order production on the ground that the application before him being under § 115 of the Companies Act, 1862, he had a discretion as to making an order for production. The Court of Appeal refused to interfere with his discretion, but guarded themselves from deciding whether production could or could not be enforced.

[7] Namely, Hughes *v.* Vargas, 1893, and Latter *v.* Goolden, supra. In Latter *v.* Goolden the protection was successfully claimed by the head of the department for a letter containing a character written to the authorities at the Mint, though he only said that it was a confidential document, and that as the Civil Service Commissioners received some 20,000 characters a year, Government would be much inconvenienced if the production of any of them could be enforced in a Court of Law, and did not allege that public policy (as such) would be in any way affected by the production of the particular document.

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§§ 947—948. whether such document is or is not protected from production on grounds of State policy, and if he claims such protection the court will not go behind the claim, or inquire whether the document be or be not one which can properly be the subject of such a claim. It does not appear to be in every case essential that the principal officer of a Government department should himself attend the court to take an objection to the production of documents in the possession of the department. In many cases the court will be satisfied of the validity of the objection by other evidence, as by the affidavit of a responsible officer.[1] Notwithstanding these decisions it may, however, be[2] that if a minister or head of a department, instead of attending at the trial personally, sent the required papers by the hands of a *subordinate* officer, the judge would examine them himself and compel their production, unless he were satisfied that they ought, on public grounds, to be withheld.

§ 947A. In America the President of the United States, and the Governors of the several States, are not bound to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient.[3] And the same doctrine, as it would seem, prevails in England, whenever ministers of State are called as witnesses for the purpose of producing public documents.[4]

§ 948. When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.[5] In an action of trespass against the governor of a colony, a military officer under his control may, however, be asked in general terms, whether he did not act by the direction of the defendant, though the written instructions cannot be given in evidence.[6]

[1] Joseph Hargreaves, Lim., In re, supra (Wright, J.).

[2] As suggested in Beatson *v.* Skene, 1860, 29 L. J. Ex. 430. See, also, Dickson *v.* Earl of Wilton, 1859, 1 F. & F. 425 (Ld. Campbell), discussed in Dawkins *v.* Ld. Rokeby, 1873, L. R. 8 Q. B. 255.

[3] 1 Burr's trial, about 1807 (Am.) (Marshall, C. J.); Gray *v.* Pentland, 1815, 2 Serg. & R. 23 (Am.).

[4] Beatson *v.* Skene, 1860, 29 L. J. Ex. 430.

[5] Gray *v.* Pentland, 1815, 2 Serg. & R. 23 (Am.) (Tilghman, C.J.), cited with approbation in Yoter *v.* Sanno, 1837, 6 Watts, 166 (Am.) (Gibson, C.J.). See, also, Stace *v.* Griffith, 1869, L. R. 2 P. C. 420; and ante, § 918.

[6] Cooke *v.* Maxwell, 1817, 2 Stark. N. P. 183.

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§ 948A. The objection that a document is protected from production as being a "State document" cannot, however, be given effect to unless it be taken by the proper officer of the Government himself (*i.e.*, a minister or head of a department), who may not have counsel to argue in support of his objection. The claim that a document is protected as a State document is not available to either of the parties to the action.[1]

§ 949.[2] There is a *fifth* kind of evidence which the law excludes, on public grounds, namely, that which involves the *unnecessary* disclosure of matter that is *indecent*, or offensive to public morals, or *injurious to the feelings of third persons*. A disclosure is for this purpose "unnecessary" whenever the parties themselves have no interest in the matter, except what they have impertinently created. The mere indecency of disclosures will not exclude them, where the evidence is *necessary* for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery.[3] But where the parties have impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers[4] or contracts respecting the sex of a third person,[5] or upon the question whether an unmarried woman has had a child.[6]

[1] Blake *v.* Pilfold, 1832, 1 M. & Rob. 198, as explained by C. A. in Latter *v.* Goolden, 1894, supra.

[2] Gr. Ev. § 253, almost verbatim.

[3] See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), §§ 16, 27, 33.

[4] No wager is now recoverable, 8 & 9 V. c. 109 ("The Gaming Act, 1845"), § 18; 55 V. c. 4 ("The Betting and Loans (Infants) Act, 1892"). See Higginson *v.* Simpson, 1877, 2 C. P. D. 76; Diggle *v.* Higgs, 1877, 2 Ex. D. 422; Hampden *v.* Walsh, 1876, 1 Q. B. D. 189; Read *v.* Anderson, 1884, 10 Q. B. D. 100 (C. A.); Trimble *v.* Hill, 1879, 5 App. Cas. 342 (P. C.).

[5] Da Costa *v.* Jones, 1778, 2 Cowp. 729.

[6] Ditchburn *v.* Goldsmith, 1815, 4 Camp. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the court will not proceed at all in the trial. Brown *v.* Leeson, 1792, 2 H. Bl. 43; Henkin *v.* Gerss, 1810, 2 Camp. 408. But see Hussey *v.* Crickett, 1811, 3 Camp. 168.

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§ 950. § 950. In like manner, when the legitimacy of a child born in wedlock is the question in dispute, the testimony of the parents, that they have or have not *had connection*, has,—on the same grounds of decency, morality, and policy,—until recent times, been uniformly rejected by the judges.[1] This rule has not[2] been superseded,[3] and it excludes not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause;[4] and it applies to the depositions of the parents equally with their vivâ voce testimony.[5] It does not, however, exclude the evidence of a husband that he did not have intercourse before marriage with the woman who subsequently became his wife, although the effect of such evidence is to bastardize a child born after the marriage.[6] The rule is not affected by the circumstance, that, at the time of the examination of one of the parents, the other is dead; because the rule has been established on the broad basis of general public policy.[7] But it does not exclude statements by its deceased mother that a child is a bastard.[8] Nor does it preclude the parents from proving that their supposed marriage was either invalid,[9] or valid,[10] or that their children were born before or after its celebration, though the

[1] Goodright *v.* Moss, 1777, 2 Cowp. 594; Legge *v.* Edmonds, 1855, 25 L. J. Ch. 125; Cope *v.* Cope, 1833, 1 M. & Rob. 269; Wright *v.* Holdgate, 1850, 3 C. & K. 158; R. *v.* Luffe, 1807, 8 East, 193; R. *v.* Rook, 1752, 1 Wills. 340; R. *v.* Reading, 1734, Cases temp. Hardw. 79; R. *v.* Mansfield, 1841, 1 Q. B. 444; Com. *v.* Shepherd, 1814, 6 Binn. 283 (Am.). See ante, § 649.

[2] In re Walker, In re Jackson, 1885, 53 L. T. 660, following Guardians of Nottingham *v.* Tomkinson, 1879, 4 C. P. D. 343; followed Burnaby *v.* Baillie, 1889, 42 Ch. D. 282. See, also, Aylesford Peerage case, 1885, 11 App. Cas. 1 (H. L.).

[3] By either 32 & 33 V. c. 68 (cited post, § 1355), or by two modern decisions, which were at one time supposed to have this effect, namely, In re Rideout's Trusts, 1870, L. R. 10 Eq. 41; Re Yearwood's Trusts, 1877, 5 Ch. D. 545.

[4] Wright *v.* Holdgate, 1850, 3 C. & K. 158; R. *v.* Sourton, 1836, where, to prove non-access, the father was asked whether, at a particular time, he did not live with her sister 100 miles away from his wife; it was held that this question could not be put. But see Gordon *v.* Gordon and Gordon, [1903] P. 141 (Jeune, P.).

[5] Goodright *v.* Moss, 1777, 2 Cowp. 591 (Ld. Mansfield); Cope *v.* Cope, 1853, 5 C. & P. 604; Atchley *v.* Sprigg, 1864, 33 L. J. Ch. 345; Re R——'s Trusts, 1870, 39 L. J. Ch. 192, explaining Plowes *v.* Bossey, 1862, 31 L. J. Ch. 681; Inglis *v.* Inglis and Allen, 1867, 16 L. T. 775.

[6] Powlett Peerage case, [1903] A. C. 395.

[7] R. *v.* Kea, 1809, 11 East, 132.

[8] Ulverstone Union *v.* Park, 1889, 53 J. P. 629. See, also, Bunsby *v.* Baillie, 1889, 42 Ch. D. 282.

[9] In re Darcys, 1860, 11 Ir. C. L. R. 298.

[10] R. *v.* Bramley, 1795, 6 T. R. 330; Standen *v.* Standen, 1791, Peake, R. 45.

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effect of such evidence is, in the first and third cases, to bastardize the issue, and, in the others, to establish its legitimacy.[1] For this purpose, too, their declarations or their old answers in Chancery are admissible evidence.[2] On the other hand, a father cannot be heard to contradict his own admissions of access.[3]

§ 951. In a bastardy case, too, a married woman may, when the fact of her husband's non-access has already been proved by independent evidence, confess her adulterous connection with another person, and thus enable the justices, in the event of her testimony being corroborated in some material particular,[4] to make the order of maintenance.[5] But this exception to the general rule of exclusion is founded on necessity; since the fact, to which she is permitted to testify, is probably within her own knowledge and that of the adulterer alone.[6] Moreover, in an action against a husband for necessaries supplied to his wife while living alone, the wife is an admissible witness for the defendant to prove that she has committed adultery, and that, consequently, he is not responsible for her maintenance.[7] Such evidence is strictly legal, however open to comment, not only as coming from a polluted source, but as the possible result of collusion between the husband and the wife for the purpose of defeating the plaintiff's claim.[8]

[1] Goodright *v.* Moss, 1777, 2 Cowp. 591, and the cases referred to in Ld. Mansfield's judgment.

[2] Id.

[3] The Aylesford Peerage case, 1885, 11 App. Cas. 1 (H. L.).

[4] 35 & 36 V. c. 65 ("The Bastardy Laws Amendment Act, 1872"), § 4; 36 V. c. 9 ("The Bastardy Laws Amendment Act, 1873"), § 5; 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.

[5] R. *v.* Reading, 1734, Cases temp. Hardw. 79; Cope *v.* Cope, 1853, 5 C. & P. 604; Legge *v.* Edmonds, 1855, 25 L. J. Ch. 125.

[6] R. *v.* Luffe, 1807, 8 East, 202.

[7] Cooper *v.* Lloyd, 1859, 6 C. B. N. S. 519.

[8] Id. (Willes, J.).

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CHAPTER II.

MATTERS NOT PROVABLE BY A SINGLE WITNESS.

§§ 952—953.

§ 952.[1] UNDER this head it is proposed to mention briefly the Statutes as to Treason and certain other statutes and rules of law which regulate particular cases, and take them out of the operation of the general principles by which they would otherwise be governed.

§ 952A. By the common law *treason* and the modern misprision of treason were sufficiently proved by one credible witness.[2] But by statute it is enacted that no person shall be indicted, tried, or attainted of treason but upon the oaths and testimony of *two lawful witnesses*, either both to the same overt act, or one to one and the other to another overt act of the same treason, unless the accused shall willingly without violence, in open court, confess the same;[3] and further, that if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason.[4]

§ 953. This protective rule as to treason—which in England has existed since the days of William III., and in Ireland was adopted in the year 1821,—has been incorporated, with some slight variations, into the constitution of America,[5] and may be met with in the statutes of most, if not all, of the States in the Union.

[1] Gr. Ev. § 255, in part.

[2] Fost. C. L. 233; M'Nally, Ev. (Ir.) 31; R. *v.* Clare, 1803, 28 How. St. Tr. 887; Woodbeck *v.* Keller, 1826, 6 Cowen, 120 (Am.).

[3] As to the confession, see ante, § 866.

[4] 7 W. 3, c. ("The Treason Act, 1695"), §§ 2, 4, extended to Ireland by 1 & 2 G. 4, c. 24.

[5] "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt* act, or on confession in open court:" Const. U. S. Art. 3, § 3; Laws U. S. vol. 2, ch. 36, § 1.

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§ 953A. From the earliest notice of this rule, which is in a repealed statute temp. Henry VIII.,[1] it appears probable, that the original reason for its adoption was that, "Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason."[2]

§ 954. Its modern continuance may be ascribed, in part, to the tenacity with which men hold to established forms; in part to the duty of allegiance, which may be supposed to counterpoise the information of a single witness;[3] and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused, while the counter-presumption, that on so serious a trial no witness would be guilty of criminative perjury is forgotten.[4] But the best reasons, for the regulation are, that, on State trials, the prisoner has to contend against the whole power of the Crown; which is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused and to his family, were, until very recently,[5] savage and revolting.

§ 955. Notwithstanding the above rule, it is sufficient to warrant a conviction if there be one witness to one overt act of treason, and another witness to another overt act of the same species of treason.[6] Moreover, any *collateral* matter not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extrajudicial confession of the prisoner, or by other evidence admissible at common law.[7] For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the

[1] 25 Hen. 8, c. 14.
[2] Ld. Stafford's case, 1680, 7 How. St. Tr. 1459 (Ld. Nottingham, C.).
[3] 4 Bl. Com. 358.
[4] 3 Benth. Ev. 391, 392.
[5] 33 & 34 V. c. 23 ("The Forfeiture Act, 1870"), §§ 1, 31.
[6] Ld. Stafford's case, 1680, 7 How. St. Tr. 1459.
[7] Fost. C. L. 242; 1 East, P. C. 130.

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§§ 955—957. British Crown may be established by his admission, or by the testimony of one witness.[1]

§ 956.[2] In treason, and misprision of treason, no evidence can be given of any overt act not expressly laid in the indictment.[3] The meaning of this rule is, not that the whole detail of facts shall be set forth, but that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment, or unless it conduce to the proof of any of the overt acts which are laid.[4] Accordingly, in one case,[5] prisoner's correspondence with the Pretender was allowed to be read in evidence, although it was a substantive treason in itself,[6] and was not charged as an overt act in the indictment, because it tended directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne. On similar grounds the publication of the Pretender's manifesto by a prisoner was read against him in 1746, since it was strong proof of the intention with which he had joined the rebel army, and so was evidence in support of the overt act laid in the indictment charging him with marching in a warlike manner to depose the King.[7] On the other hand, however, when a prisoner was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the Royal Clancarty, the court rejected the evidence of his cruising in another vessel; as, if it were true, it would be no sort of proof of the act for which he was then to answer.[8]

§ 957.[9] This rule is moreover not peculiar to trials for treason; though expressly enacted in the later statutes of treason. But it is nothing more than a particular application of the well-known doctrine, that the proof must correspond with

[1] R. *v.* Vaughan, 1696, 13 How. St. Tr. 535.

[2] Gr. Ev. § 256, in part, as to first six lines.

[3] 7 W. 3, c. 3 ("The Treason Act, 1695"), § 8. This section is not incorporated in the Irish Act of 1 & 2 G. 4, c. 24, but as the rule is also recognised at common law, this would seem to be immaterial.

[4] Fost. C. L. 245; 1 East, P. C. 121—123.

[5] Layer's case, 1722, 16 How. St. Tr. 93.

[6] By 13 W. 3, c. 3 ("The Act of Settlement"), § 2.

[7] R. *v.* Deacon, 1746, Fost. C. L. 9; R. *v.* Wedderburn, 1746, 18 How. St. Tr. 425.

[8] R. *v.* Vaughan, 1696, 13 How. St. Tr. 535.

[9] Gr. Ev. § 256, in part.

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§§ 957—959.

the allegations, and be confined to the point in issue.[1] The issue in treason, is whether the prisoner committed that crime by doing one or more of the treasonable acts stated in the indictment; just as in defamation it is, whether defendant injured plaintiff by maliciously uttering any of the slanders laid in the statement of claim. In either case evidence of collateral facts is admitted or rejected on the like principle, accordingly as it does or does not tend to establish the specific charge. The declarations of the prisoner, and seditious language used by him, are accordingly admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged;[2] and, in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in other counties, may be given in evidence, subject, however, to such proof being ultimately rejected if the overt act, in corroboration of which they are tended, is not proved to have been done in the county as laid.[3]

§ 958. In connection with this subject it only remains to be noticed that the protective provisions of the Statutes of Treason which have just been mentioned,[4] do not apply to treasons which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Sovereign, where the overt act or acts alleged are the assassination of His Majesty, or any attempt to injure in any manner whatsoever the Royal person; or to the misprisions of any such treason. In all these cases the accused is indicted, arraigned, tried and attainted, *upon the like evidence*, as if he stood charged with murder.[5]

§ 959.[6] In proof of the crime of *perjury* two witnesses were, it seems, formerly thought to be necessary.[7] This strictness,

[1] Ante, §§ 218, 298.

[2] R. *v.* Watson, 1817, 2 Stark. R. 139; United States *v.* Hanway, 1851, 2 Wall. Jr. 139 (Am.).

[3] R. *v.* Layer, 1722, 16 How. St. Tr. 214; R. *v.* Deacon, 1746, Fost. C. L. 9; R. *v.* Vane, 1662, 6 How. St. Tr. 123.

[4] 7 A. c. 21 ("The Treason Act, 1708"); 7 W. 3, c. 3 ("The Treason Act, 1695"); 6 G. 3, c. 53, § 3.

[5] 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2 (Ir.); 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1.

[6] Gr. Ev. § 257, in part.

[7] This is said to have been the opinion of Ld. Tenterden: 3 St. Ev. 860, n. *g.*; R. *v.* Champney, 1836, 2 Lewin, C. C. 259.

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§§ 959, 960.

however, if it ever was law, has long since been relaxed.[1] The true principle is merely this, that the evidence showing the falsity must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.[2] The oath of the opposing witness, therefore, will not avail, unless corroborated by material and independent circumstances; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, the jury could not safely convict.[3] So far the rule is founded on substantial justice.[4] It would not, however, be precisely accurate to say, that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose.[5] For instance, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness.[6] But the confirmatory evidence will not be sufficient to warrant a conviction if it be so only in some slight particulars;[7] but it must at least be strongly corroborative;[8] or, as has been said in quaint but energetic language, "a strong and clear evidence, and more numerous than the evidence given for the defendant."[9]

§ 960.[10] When several assignments of perjury are included in the same indictment, it does not seem clearly settled whether,

[1] The supposed history of its relaxation is given in n. 2 to § 257 of Greenleaf on Ev. (15th edit.) 1892.

[2] See R. *v.* Lee, 1766, cited 2 Russ. C. & M. 650.

[3] 4 Bl. Com. 358; R. *v.* Gaynor, 1839, 1 Crawf. & D. C. C. 142 (Ir.); R. *v.* Braithwaite, 1859, 8 Cox, C. C. 254, 444.

[4] R. *v.* Yates, 1841, C. & Mar. 139.

[5] R. *v.* Gardiner, 1839, 8 C. & P. 737; R. *v.* Shaw, 1865, L. & Cave, 579.

[6] R. *v.* Mayhew, 1834, 6 C. & P. 315. See, also, R. *v.* Towey, 1860, 8 Cox, C. C. 328.

[7] R. *v.* Yates, 1841, C. & Mar. 139; R. *v.* Boulter, 1852, 21 L. J. M. C. 57.

[8] R. *v.* Champney, 1836, 2 Lewin, C. C. 259, and R. *v.* Wigley, 1835, 2 Lewin, C. C. 258; Jorden *v.* Money, 1854, 23 L. J. Ch. 865 (H. L.); Woodbeck *v.* Keller, 1826, 6 Cowen, 120 (Am.); Reg. *v.* Braithwaite, 1859, 1 F. & F. 638; Reg. *v.* Boulter, infra; State *v.* Buie, 1875, 43 Tex. 532 (Am.); State *v.* Held, 1874, 57 Mo. 252 (Am.). Any attempt to define the degree of corroboration required will be illusory: Reg. *v.* Shaw, 1865, L. & Cave, 579.

[9] R. *v.* Muscot, 1713, 10 Mod. 194. See The State *v.* Molier, 1826-34, 1 Dev. 263 (Am.); The State *v.* Hayward, 1819, 1 Nott and M'C. 547 (Am.); Clark's Exors. *v.* Van Reimsdyk, 1815, 9 Cranch, 153 (Am.).

[10] Gr. Ev. § 257A, nearly verbatim.

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§§ 960, 961.

in addition to the testimony of a single witness, corroborative proof must be given with respect to each. The better opinion is that such proof is necessary; and *that*, too, although all the perjuries assigned were committed at one time and place.[1] For instance, if a person, on putting in his statement of affairs in bankruptcy, or on other the like occasion, has sworn that he has made certain payments, and is then indicted for perjury on several assignments, each specifying a particular payment which has not been made, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.[2]

§ 961.[3] The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America that a man may be convicted of perjury on documentary and circumstantial evidence alone,—*first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters

[1] R. *v.* Virrier, 1840, 12 A. & E. 324; Williams *v.* Comm., 1879, 91 Pa. St. 493 (Am.); Reg. *v.* Parker, 1842, Staff. Summer Assizes, ubi supra; and also cited Russell on Crimes, vol. iii. (5th edit.) p. 80. But where the act denied is of a continuous nature, e.g., "treating," proof of one act in pursuance of it at one part of the day proved by one witness, and of another act in pursuance of it at another part of the day proved by another witness, will be sufficient: R. *v.* Hare, 1876, 13 Cox, C. C. 174.

[2] R. *v.* Parker, 1842, C. & Marsh. 639. In R. *v.* Mudie, 1831, 1 M. & Rob. 128, Ld. Tenterden refused to stop such a case, saying that defendant, if convicted, might move for a new trial. He was acquitted, however.

[3] Gr. Ev. § 258, in part.

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§§ 961, 962.

relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.[1]

§ 962.[2] If the evidence adduced in proof of the crime of perjury consists of *two opposing statements by the prisoner*, and nothing more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances against him.[3] And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given.[4] If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered* with,[5] or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained.[6] Where, too, the nature of the statements was such, that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence of the falsehood of the one deposed to by the prisoner would probably be sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief,

U. S. *v.* Wood, 1840, 14 Peters, 430 (Am.). In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise have been actually purchased," upon the evidence of the invoice-book of his father, John Wood, of Saddleworth, Eng., and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the Government of the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves attentive perusal.

[2] Gr. Ev. § 259, in great part.

[3] See Alison, Cr. L. (Sc.) 481.

[4] R. *v.* Wheatland, 1838, 8 C. & P. 238; R. *v.* Gaynor, 1839, 1 Crawf. & D. C. C. 142 (Ir.); R. *v.* Harris, 1822, 5 B. & Ald. 926.

[5] Anon., 1764, 5 B. & Ald. 939 (Yates, J., Ld. Mansfield, Wilmot and Aston, JJ., concurring). See observations of Mr. Greaves on this case, in 2 Russ. C. & M. 653, n.

[6] R. *v.* Knill, 1822, 5 B. & Ald. 929; R. *v.* Hook, 1857, Dears. & Bell, 606.

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and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time.[1] Moreover, when a man merely swears to the best of his *memory and belief*, it of course requires very strong proof to show that he is wilfully perjured.[2]

§ 963. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence.[3] Moreover, when several facts must be proved to make out an assignment of perjury, each of these facts may, in strict law, be established by the uncontroverted testimony of a single witness. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury.[4]

§ 964. Cases of *bastardy* form another class of cases in which the evidence of more than one witness is required. A man cannot be adjudged to be the putative father of an illegitimate

Holroyd, J., in R. *v.* Jackson, 1823, 1 Lewin, C. C. 270. This very reasonable doctrine is in perfect accordance with the rule of the criminal law of Scotland, as laid down by Mr. Alison, in his excellent treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded, that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition." See Alison, Cr. L. (Sc.) 476.

[2] Tindal, C.J., in R. *v.* Parker, 1842, C. & Marsh. 639.

[3] 2 Russ. C. & M. 654; 2 Hawk. P. C. c. 46, § 10; Com. *v.* Pollard, 1847, 12 Metc. 225 (Am.).

[4] R. *v.* Roberts, 1848, 2 C. & Kir. 614.

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§§ 964—964b. child on the single testimony of the mother; but before an order of affiliation can be made by the petty sessions,[1] or confirmed by the quarter sessions,[2] the mother must not only be a witness,[3] but her evidence must be corroborated,[4] *in some material particular*, by other testimony, to the satisfaction of the justices; and the order will be bad, if it does not allege that the confirmatory evidence was material.[5] This rule protects men from accusations which profligate, designing, and interested women might easily make, which, however false, it might be extremely difficult to disprove. Still, it must not be strained so as to render corroboration necessary with respect to the actual begetting of the child, but it will suffice if any evidence be forthcoming calculated to raise a probability that illicit intercourse may have taken place, as, for example, proof of acts of familiarity between the mother and the putative father, though these may have occurred long prior to the date when the child was begotten.[6]

§ 964A. In actions for breach of promise of marriage, again, more evidence than that of the plaintiff is needed. The plaintiff, though now an admissible witness, cannot recover a verdict on his or her own uncorroborated testimony, but some other *material* evidence in support of the promise must be forthcoming.[7]

§ 964B. Moreover, in certain settlement cases, one witness is not sufficient. For no order for the removal of a pauper, in respect of a settlement acquired by three years' residence in a parish, can be made "upon the evidence of the person to be removed, without such corroboration as the justices or court *may think sufficient*."[8]

[1] 35 & 36 V. c. 65 ("The Bastardy Laws Amendment Act, 1872"), § 4; 36 V. c. 9 ("The Bastardy Laws Amendment Act, 1873"), § 5. Therefore, if she be dead there is no jurisdiction. The Queen *v.* Armitage, 1872, L. R. 7 Q. B. 773.

[2] 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.

[3] R. *v.* Armitage, 1872, L. R. 7 Q. B. 773.

[4] See Hodges *v.* Bennett, 1860, 29 L. J. M. C. 224.

[5] R. *v.* Read, 1839, 9 A. & E. 619.

[6] Cole *v.* Manning, 1877, 2 Q. B. D. 611. In the recent case of Harvey *v.* Anning, 1903, 87 L. T. 687 (Ld. Alverstone, C.J. and Channell, J., Wills, J., dissentiente), it was held that evidence to the effect that the mother and the putative father had been "seen out together evenings in the lanes," and that after the birth of the child the putative father asked if the mother "was going to swear the child" was sufficient corroboration in some material particular. Sed qu. this case.

[7] 32 & 33 V. c. 68, § 2. See Hickey *v.* Campion, 1872, Ir. R. 6 C. L. 557; Bessela *v.* Stern, 1877, 2 C. P. D. 265 (C. A.).

[8] 39 & 40 V. c. 61, § 34; R. *v.* Abergavenny Union, 1880, 6 Q. B. D. 31.

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§ 964c. Where the unsworn evidence of a child of tender years who does not understand the nature of an oath is admitted under the Criminal Law Amendment Act, 1885,[1] or the Prevention of Cruelty to Children Act, 1904,[2] it is provided that the person charged with the offence shall not be convicted unless such testimony is corroborated "by some other material evidence in support thereof implicating the accused."

§ 965. It has sometimes been supposed that it is an absolute rule of law that a court *cannot* act on the unsupported testimony of any person in his own favour.[3] But there is no actual rule of law to the effect suggested; though a court ought to regard a claim against a dead man's estate which is only supported by the evidence of the claimant with suspicion; but if in the result it convinces the court that the claim should be allowed the court should allow the claim.[4]

§ 966. Again, in *Ecclesiastical Courts* the testimony of a single witness, though "omni exceptione major," is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call "adminicular circumstances."[5] This doctrine is now of little practical importance, as the spiritual courts have, by a series of legislative improvements, been shorn of most of their jurisdiction over the laity, though they still possess it over the clergy. In prosecutions under the Church Discipline Act,[6] the Court of Arches will still be guided by the old ecclesiastical rules as to evidence, and will require the testimony of a single witness to be corroborated at least to a certain extent.[7]

[1] 48 & 49 V. c. 69, § 4, post, § 1389 C.

[2] 4 Edw. 7, c. 15, § 15, post, § 1389 D.

[3] In re Harnett, Leahy *v.* O'Grady, 1886, 17 L. R. Ir. 543; Down *v.* Ellis, 1865, 35 Beav. 578; Grant *v.* Grant, 1865, 2 Curt. 16; Nunn *v.* Fabian, 1866, L. R. 1 Ch. 35; Hartford *v.* Power, 1869, Ir. R. 3 Eq. 602; U. falsely called J. *v.* J., 1867, L. R. 1 P. & D. 461.

[4] Rawlinson *v.* Scholes, 1899, 79 L. T. 350 (D.); In re Griffin, [1899] 1 Ch. 408 (Byrne, J.); In re Garnett, Gandy *v.* Macaulay, 1885, 31 Ch. D. 1 (C. A.); In re Hodgson, Beckett *v.* Ramsdale, 1885, 31 Ch. D. 177 (C. A.).

[5] Donellan *v.* Donellan, 1795, 2 Hagg. Ecc. 144; Simmonds *v.* Simmonds, 1847, 5 Notes of Cases, Ecc. & Mar. 324 (Dr. Lushington); Id. (Sir H. Fust); Crompton *v.* Butler, 1790, 1 Hagg. Cons. 460; Hutchins *v.* Denziloe, 1792, 1 Hagg. Cons. 181.

[6] 55 & 56 V. c. 32.

[7] Berney *v.* Bp. of Norwich, 1866, 36 L. J. Ecc. 10 (P. C.). This case seems to overrule Burder *v.* O'Neill, 1863, 9 Jur. N. S. 1109. See, also, Moore *v.* Oxford (Bishop), [1904] A. C. 283.

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§§ 966a, 967.

§ 966A. In the Probate and Divorce Division of the High Courts, whether for England or Ireland, the rules of evidence observed in the old superior Courts of Common Law are applied to the trial of all questions of fact.

§ 967. Cases which depend upon the evidence of *accomplices* form another class of cases in which corroboration is usually required; for accomplices are usually interested,[1] and always infamous, witnesses, whose testimony is admitted from necessity, since it is often impossible to bring the principal offenders to justice without having recourse to such evidence. In[2] point of law, an accomplice is a competent witness. Even when he is upon his trial with his fellows, if the case against him be only slight, an acquittal, as against him, will usually be directed, and his evidence taken.[3] But the admission of the evidence of an accomplice, who is on his trial, is entirely a matter for the discretion of the judge, who will generally refuse to accept the evidence of an accomplice who appears to have really been the principal offender.[4] After conviction for an offence which has merely been punished by inflicting a fine, an accomplice is a competent witness after he has paid his fine.[5] But in any case, where the evidence of an accomplice is received, the *degree of credit* which ought to be given to his testimony is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please, act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement.[6] Judges, however, in their discretion, generally

[1] It used to be "a popular saying, that they fished for prey, like tame cormorants, with ropes round their necks": Macaulay's History of Engl. vol. 1, ch. 5, p. 666.

[2] Gr. Ev., in great part.

[3] Greenleaf on Ev., 15th edit. (1892), § 379.

[4] People *v.* Whipple, 1827, 9 Cowen, 707 (Am.); Id. 13 n.; Commonwealth *v.* Knapp, 1830, 9 Pick. 507 (Am.).

[5] Rex *v.* Burley, 1818, 2 Stark. Ev.

[6] R. *v.* Stubbs, 1855, 25 L. J. M. C. 16; R. *v.* Hastings, 1835, 7 C. & P. 152; R. *v.* Jones, 1809, 2 Camp. 131; R. *v.* Atwood, 1789, 1 Lea, C. C. 464; R. *v.* Durham, 1787, 1 Lea, C. C. 478; R. *v.* Dawber, 1821, 3 Stark. R. 34; R. *v.* Sheehan, 1826, Jebb, C. C. 54; R. *v.* Jarvis, 1837, 2 M. & Rob. 40.

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§§ 967, 968.

advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review,[1] its omission will, in most cases, be deemed a neglect of duty on the part of a judge.[2] Considering, too, the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice.[3] The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but they only advise them not to give credit to the testimony.

§ 968. It has been suggested that this practice is not applicable to *misdemeanour*.[4] There appears, however, to be no foundation, either in reason or law, for such a distinction between misdemeanours and felonies; and if it ever existed, it now no longer prevails. And the fact that the accomplice has, before giving his evidence, been convicted summarily of another offence under the same Act, affords no ground for dispensing with corroboration of his evidence.[5] At the same time, the practice of the caution from the bench is not so uniform in cases of misdemeanours as in felonies. For if the offence be one of a purely legal character, as, for instance, the non-repair of a highway,—or if it imply no great moral delinquency, as the fact of having been present as a spectator at a prize-fight,[6] which unfortunately terminated in manslaughter,[7]—the parties concerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence. Neither, in actions for penalties, does the law apprehend any danger from the mere fact of jurors being left, without any special caution from the bench, to weigh the uncorroborated testimony of an accomplice.[8]

[1] R. *v.* Boyes, 1861, 30 L. J. Q. B. 302.
[2] R. *v.* Barnard, 1823, 1 C. & P. 88; R. *v.* Wilkes, 1836, 7 C. & P. 273.
[3] R. *v.* Gallagher, 1883, 13 Cox, C. C. 61.
[4] Per Gibbs, Att.-Gen., arg. in R. *v.* Jones, 1809, 2 Camp. 131.
[5] R. *v.* Farler, 1837, 8 C. & P. 106.
[6] See R. *v.* Coney, 1882, 8 Q. B. D. 534.
[7] R. *v.* Hargrave, 1831, 5 C. & P. 170; R. *v.* Young, 1866, 10 Cox, C. C. 371.
[8] M'Clory *v.* Wright, 1860, 10 Ir. C. L. R. 514; Magee *v.* Mark, 1860-1, 11 Ir. C. L. R. 449.

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§§ 969, 970.

§ 969.[1] But although, on ordinary criminal trials, it is the settled practice to require evidence in corroboration of that of an accomplice, yet the *manner and extent of the corroboration* required are not very clearly defined. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; others, again, have thought it essential that corroborative proof should be given of the *prisoner* having actually participated in the offence; and that when several prisoners are tried, confirmation should be required as to all of them, before all can be safely convicted.[2] This last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the commission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but on the contrary every motive to declare the truth, if he wishes to be believed when he shall afterwards endeavour to fix the crime upon the prisoner.[3]

§ 970. A late learned judge said[4] that in his opinion the corroboration "ought to consist in some circumstance that affects *the identity of the party accused.* A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. * * * The danger is, that when a man is fixed, and knows that his own guilt is detected, he will purchase impunity by falsely accusing others." The real rule, however, appears to be that the extent of the corroboration required will

[1] Gr. Ev. § 381, in great part.

[2] R. *v.* Stubbs, 1855, 25 L. J. M. C. 16.

[3] R. *v.* Farler, 1837, 8 C. & P. 106; R. *v.* Wilkes, 1836, 7 C. & P. 273; R. *v.* Moores, 1836, 7 C. & P. 270; R. *v.* Addis, 1834, 6 C. & P. 388; R. *v.* Wells, 1829, M. & M. 326; R. *v.* Sheehan, 1826, Jebb, C. C. 54; R. *v.* Carey, 1837, Jebb, C. C. 203 (Ir.).

[4] R. *v.* Farler, 1837, 8 C. & P. 106.

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§§ 970, 971.

depend upon the gravity of the crime.[1] In any case, moreover, in which two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same confirmation is required as if they were but one.[2] The testimony, too, of the wife of an accomplice has been held not to be corroborative of the evidence of her husband.[3]

§ 971.[4] To one class of persons, *apparently accomplices*, the rule requiring corroborative evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. The early disclosure is considered as binding the party to his duty; and though a great degree of disfavour may attach to him for the part he has acted as an *informer*,[5] yet his case is not treated as that of an accomplice.[6] Moreover, it has been held in America that one who only enters into communication with criminals without any criminal intent himself, and solely for the purpose of detecting them in a criminal act, is not an accomplice.[7] It has also been there held that in any case to be an accomplice, one must be indictable as a participator in the offence.[8] Yet it has been laid down in America that officers of justice and detectives have no right to decoy others into crime in order to

[1] R. *v.* Jervis, 1837, 2 M. & Rob. 40. Whether a woman who voluntarily submits to an attempt to procure abortion is an accomplice or not, probably depends in each case on the facts. See R. *v.* Cramp, 1880, 5 Q. B. D. 307. In America, it is said to have been decided (it is hard to see on what grounds) that she usually must not be so regarded: Greenleaf on Ev. 15th edit. (1892), § 332, and note thereto. Why is she not an accomplice, on the same grounds as if when two attempt suicide together the survivor is guilty of murder?

[2] R. *v.* Noakes, 1832, 5 C. & P. 326; R. *v.* Magill, 1842, Ir. Cir. R. 418.

[3] R. *v.* Neal, 1835, 7 C. & P. 168.

[4] Gr. Ev. § 382, almost verbatim.

[5] *Valore.* "But these are called Informers; men that live
By treason, as rat-catchers do by poison."
Beaumont's "Woman Hater," Act V., Sc. 2.

[6] R. *v.* Despard, 1803, 28 How. St. Tr. 489.

[7] Com. *v.* Downing, 1855, 4 Gray, 29 (Am.); State *v.* McKean, 1873, 36 Iowa, 349 (Am.).

[8] Com. *v.* Wood, 1858, 11 Gray, 85 (Am.); Com. *v.* Boynton, 1874, 116 Mass. 343 (Am.).

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§ 971. capture them as offenders, and that, indeed, to do so may even be criminal.[1] Moreover, if property be taken with a man's *consent*, even though such consent be given in order that the taker may be convicted of theft, such taking has, in America, been held to be no larceny.[2]

[1] See Cannon *v.* People, 1893, 36 Am. St. R. 295.
[2] Ibid.

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